Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 15.

ORIGINAL.

COMMONWEALTH OF KENTUCKY, *Petitioner*,

vs.

ANDREW M J. COCHRAN, *Defendant*.

ON PETITION FOR WRIT OF MANDAMUS.

BRIEF FOR DEFENDANT.

STATEMENT.

At the August, 1900, term of the Circuit Court of Scott County, Kentucky, Caleb Powers was tried under an indictment charging him with being an accessory before the fact to the murder of William Goebel, and found guilty by the jury, and his punishment fixed at imprisonment for life. The Court of Appeals of Kentucky reversed the judgment rendered on

said verdict on March 28th, 1901, and remanded the case to the Scott Circuit Court for another trial. A second trial in said court resulted in another verdict of guilty and judgment thereon, which, on appeal to the Court of Appeals, was reversed on December 3d, 1902. A third trial in the Scott Circuit Court resulted in a third verdict of guilty, returned August 29th, 1903, which fixed his punishment at death, and the judgment thereon was reversed by the Court of Appeals on December 6th, 1904. The mandate of the Court of Appeals on its last judgment of reversal was filed in the Scott Circuit Court on May 3d, 1905, and the case was redocketed, and set for a fourth trial on July 10th, 1905. Immediately after the filing of said mandate in the Scott Circuit Court, Powers tendered to that court his petition, under *section 641, Revised Statutes of United States*, to remove the prosecution to the United States Circuit Court for the Eastern District of Kentucky. The Scott Circuit Court refused to allow the petition for removal to be filed. The next term of said United States Circuit Court began on May 8th, 1905, five days after the tender of the petition for removal to the state court. On that day a partial transcript of the record—all that the clerk was able to copy meanwhile—was filed in said United States Court, and the cause docketed therein, and leave given to Powers until June 8th thereafter to procure and file an additional transcript, which was done within the time allowed.

At the time the partial transcript was filed, the Commonwealth of Kentucky objected to the filing and to the docketing of the cause in the United States Court, and moved to set aside the order filing and docketing, which the court overruled. On the same day Powers moved the court for a writ of *habeas*

corpus cum causa, as provided by *section 642, Revised Statutes of United States.* This motion was sustained in an opinion delivered by Judge Cochran on July 7th, 1905, and Powers was taken from the custody of the state court and placed in the custody of said United States Court. On December 18th, 1905, the Commonwealth of Kentucky filed in this court its petition for a writ of mandamus directed to Hon. A. M. J. Cochran, Judge of the United States Circuit Court for the Eastern District of Kentucky, commanding him to remand said prosecution to the Circuit Court of Scott County, and to restore the body of Caleb Powers to the jailer of Scott County to abide the judgment and orders of the state court.

Section 641, Revised Statutes of United States, under which the removal proceedings were taken, provides as follows:

"When any civil suit or criminal prosecution is commenced in any state court, for any cause whatever, against any person who is denied or can not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, * * * such suit or prosecution may, upon the petition of such defendant filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial in the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided."

The rights which Powers claimed in his petition for removal were denied and could not be enforced in the judicial tribunals of the state, were two:

1. A right to be released from custody by virtue of an executive pardon.

2. A right to be tried by a jury selected without discrimination against members of the political party to which he belongs, because of their being members of that party.

This brief will discuss the ground for removal, based on the second of these alleged rights.

The petition for removal, in connection with the record of the proceedings in the state court, shows these facts:

In all three of the trials in that court, the state officers who selected and summoned the veniremen from whom the twelve jurymen to try Powers were chosen, purposely excluded therefrom persons qualified for jury service, solely for the reason that they were members of the same political party to which Powers belonged, to-wit, the Republican party. They did this, not in a few instances only, but systematically and repeatedly, so that not a single Republican was a member of either one of the three juries that tried him.

The jurors from whom the first jury were chosen came from Scott County.

The jurors from whom the second jury were chosen came partially from Scott County and partially from Bourbon County, an adjoining county to Scott. That jury, as selected, was composed of six jurymen from each of these two counties.

The jurors from whom the third jury were chosen came from Bourbon County.

In this record the term "Goebel Democrat" often occurs. It means those who supported William Goebel for governor in the November election, 1899, when there were three candidates,—Goebel, Taylor and Brown,—the latter of whom ran as an Independent Democrat.

The first jurors were summoned by the sheriff of Scott County. He summoned 140 men, all of whom were "Goebel Democrats, except three or four Republicans and Independent Democrats."

The statute of Kentucky gives to the Commonwealth five peremptory challenges in a prosecution for felony, and to the defendant fifteen.

The second jury was chosen partly from a list of 200 names placed in a wheel, as provided by the Kentucky statutes, by three jury commissioners in October, 1900. At that time an appeal to the Court of Appeals of Kentucky was pending from the first judgment of conviction. Those three jury commissioners were all "Goebel Democrats." Of the 200 names put by them in the jury wheel, 195 were Goebel Democrats and five were Republicans. Of these 200 names, 75 were drawn out at the regular February and May, 1901, terms of said court, and the remaining 125 were drawn out at Powers' second trial in October, 1901. Of the five Republicans whose names were placed in the wheel, one was drawn out at the February term, and one at the May term, thus leaving three to be drawn out at Powers' trial. Of those three, two were disqualified by having previously formed their opinions as to his

guilt or innocence, and the remaining one was peremptorily excused by the Commonwealth. Six jurors were selected from said 125 names drawn from the wheel, and, in order to complete the panel, the sheriff was ordered to summon 100 men from Bourbon County, and afterwards to summon 75 more men from Bourbon County. Under these orders he summoned 168 men, from whom the balance of the jury that tried Powers was selected. Of those 168 men, 165 were Goebel Democrats and the other three were Republicans.

The third jury was selected from 176 men summoned by the sheriff, of whom 172 were Goebel Democrats and three were Republicans, and the other one was a man of doubtful politics, but a supporter of Goebel in his race for governor.

The average Democratic vote of Scott County at the last three Presidential elections was 2,378, and the average Republican vote 1,977.

The average Democratic vote of Bourbon County at the said elections was 2,402, and the average Republican vote 2,314. At the election for governor in November, 1899, Taylor, the Republican candidate, received 27 more votes than Goebel in Bourbon County.

The proportion of Democratic voters to Republican *white* voters in Scott County, is less than two to one; and in Bourbon County less than three to one.

The uncontradicted allegations of the petition for removal show that this exclusion of Republicans was not accidental, but was purposely done; and that it was not because they were illiterate, nor because they were not qualified for jury service,

but because they were Republicans, because they belonged to the same political party that Powers belonged to.

The sworn allegations of a petition for removal which are not traversed, must be taken as true, except in so far as they are contradicted by the record. *Dishon v. Ry. Co., 133 Fed., 471.*

That such conduct on the part of these state officials who selected and summoned the venires from whom the juries that tried Powers were selected, was a violation of his right to the equal protection of the laws, guaranteed to him by the fourteenth amendment to the Constitution of the United States, has not been questioned in argument.

This violation of the right of Powers to demand that the jury to try him should be selected without discrimination against those who belonged to the same political party he did, was specially hurtful to him by reason of the fact that the crime with which he was charged grew out of a political controversy, to-wit, a contested election, which aroused great political feeling and animosities in the counties from which the juries that tried him came. No wiser words ever emanated from the bench than these of Judge Barker in his separate opinion on the last hearing of this case in the Court of Appeals of Kentucky (*26 Kentucky Law Reporter, 1111; 83 Southwestern Reporter, 149.*) He says:

"I do not insist that in ordinary criminal trials there is any necessity for watchfulness to keep politics out of the jury box. When ordinarily one is arraigned for crime, it is immaterial whether the jurors are of the same or an opposing political party. Usually this is a question which excites neither the interest of the accused nor that of his counsel. But when the

offense springs from an intense political contest, all becomes different. Then the political complexion of the jury is all important. The administration of even-handed justice has no more insidious enemy than political prejudice. It enters unseen and unsuspected into the human mind, corrodes the reason and undermines the judgment. Neither purity of heart nor exaltation of character affords an antidote for this deadly poison. Indeed, these virtues may well magnify the evil, for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity. The pages of history are eloquent with the evils of this passion."

This action of the sheriff and jury commissioners, in excluding Republicans from the juries that tried Powers because of their being Republicans, is not sufficient to entitle Powers to a removal of his case to the United States Court under *section 641, Revised Statutes of United States.* It is true that their action in so doing was the action of the state, and hence was in violation of Powers' right under the fourteenth amendment, to the equal protection of the laws. But *section 641* does not give a right of removal in every case where a man's right to the equal protection of the laws is violated by the state. It is only when that right is denied *in the judicial tribunals of the state*, or can not be enforced *in the judicial tribunals of the state*, that there is a right of removal. *Virginia v. Rives, 100 U. S., 313; Neal v. Delaware, 103 U. S., 370; Gibson v. Mississippi, 162 U. S., 565; Smith v. Mississippi, 162 U. S., 592; Murray v. Louisiana, 163 U. S., 101.*

This wrongful action by the subordinate officers who summoned the juries was made known to the Scott Circuit Court

by motions to discharge the venires and panel on the second and third trials, and that court decided that Powers had no right to demand that the juries empaneled to try him should be selected from men summoned without class discrimination, provided the men actually summoned possessed the qualifications prescribed by the statutes of Kentucky.

The Scott Circuit Court is the highest court in Kentucky that can decide that question. The Court of Appeals of Kentucky has jurisdiction of this prosecution, but no jurisdiction to reverse or overrule the decision of the Scott Circuit Court on that question.

ARGUMENT.

Section 641, Revised Statutes of United States, gives a right of removal in either one of two states of case:

1. Where a person is *denied* in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States.

2. Where a person *can not enforce* in the judicial tribunals of the state any right so secured to him.

As said by Mr. Justice Bradley in the case of *Texas v. Gaines, Fed. Cas. No. 13847*, in speaking of the third section of the original Civil Rights Act, which is substantially identical in its wording with *section 641:*

"Here are two classes: (1) Persons who are *denied* any of the rights secured to them by the first section of the act; (2) Persons who *can not enforce* in the courts any of said rights."

The right which Powers asserted in the second paragraph of his petition is a right secured to him by "a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The fourteenth amendment is such a law; and the right so asserted is a right secured by that clause of the amendment which provides that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws." *Strauder v. West Virginia, 100 U. S., 303.*

Judge Barker, in his separate opinion on the last hearing of this case in the Court of Appeals of Kentucky, thus tersely states the doctrine deduced from numerous decisions of this court:

"The Supreme Court of the United States, the final arbiter in all matters involving the federal constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class, for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens under the thirteenth, fourteenth and fifteenth amendments. But the application of the principle under discussion is not confined to the rights of negroes. It extends to every person—whatever his race, color or political affiliation—if his legal rights have been denied solely because thereof."

Section 1977, Revised Statutes of United States, which is section 16 of the Civil Rights Act of 1870, is also such a law.

It confers rights, not on colored persons only, but on "all persons within the jurisdiction of the United States." That such was the intention of Congress is shown by the preamble to the amendment thereto passed in 1875, which reads:

"Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color or persuasion, religious or political."

The two questions to be discussed are:

I. Was Caleb Powers, at the time of the filing of the petition for removal, *denied* in the judicial tribunals of the state the equal protection of the laws, within the meaning of section 641?

II. Was Caleb Powers, at the time of the filing of the petition for removal, *unable to enforce* in the judicial tribunals of the state his right to the equal protection of the laws, within the meaning of section 641?

I.

Section 641 does not speak of a "denial" by the state. It speaks of a denial "in the judicial tribunals of the state." The fourteenth amendment prohibits a denial of the equal protection of the laws by the state, and this prohibition applies to all the departments of the state,—legislative, executive and judicial. But the denial spoken of in section 641 is solely a *judicial* denial,—a denial "in the judicial tribunals."

A denial by executive or administrative officers of the state is not within its terms; nor is a *legislative* denial within its terms.

It is true that this court has decided in *Strauder v. West Virginia, 100 U. S., 303*, and other cases, that a legislative denial of his equal civil rights entitles a party to a removal under *section 641*. But it puts this, not upon the ground that a legislative denial is within the terms of that section, but upon the ground that *it is fair to presume* that this legislative denial will be followed by a denial in the *judicial tribunals*. As this court puts it in *Virginia v. Rives, 100 U. S., 313:*

"When a statute of a state denies his right, or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions."

As pointed out in the above cases and in the later cases that have followed them, it is not every denial "in the judicial tribunals of the state" of equal civil rights that entitles a party to a removal under that section. This is by reason of another clause in that section, which requires the petition for removal to be filed "before the trial or final hearing of the case." This excludes judicial action that takes place *after* the trial or final hearing has begun, even though that judicial action may amount to a denial of the equal protection of the laws.

The language in that section "at any time before the trial or final hearing of the case," refers to "the last and final hearing." *Ayers v. Watson, 113 U. S., 594; Insurance Co. v. Dunn, 19 Wall., 214; Baltimore & Ohio R. Co. v. Bates, 119 U. S., 464; Fisk v. Henarie, 142 U. S., 459.*

There is nothing in section 641 that excludes a denial "in the judicial tribunals of the state" from entitling a party to the benefit of a removal under that section. The only judicial denials that are excluded are those that take place after the "last and final hearing" has commenced.

Nor has this court ever decided that a denial "in the judicial tribunals of the state," which is made *before* the "last and final" trial has begun, does not come within the spirit as well as the letter of section 641, as is demonstrated by Judge Cochran in his opinion in this case.

It would be, I submit, an anomalous construction of a statute which speaks, not of a *legislative* denial, nor of an *executive* denial, but solely of a *judicial* denial,—a denial "in the *judicial* tribunals of the state,"—to say that it refers, not to a *judicial* denial, but solely to a *legislative* denial.

In *Virginia v. Rives, 100 U. S., 313*, a removal was sought on the ground that the state court had denied to the petitioner his equal civil rights, but this court puts its decision that the removal was unauthorized, not upon the ground that the denial complained of was a judicial and not a legislative denial, but upon the ground that the denial complained of was not a denial of any right of the petitioner. It was simply a refusal by the court to provide him with a mixed jury, a thing he had no right to demand.

In *Neal v. Delaware, 103 U. S., 370*, the ground for removal alleged was that negroes had always been excluded from juries in Delaware, and that this exclusion was by virtue of the constitution and laws of the state. There was a motion made to the court to quash the indictment, and the panels of the

grand and petit juries, for this reason, which the trial court overruled. But these motions, and this action of the court thereon, all took place after the petition for removal was filed, and were not, (and of course could not have been,) alleged as a ground for removal.

In *Gibson v. Mississippi, 162 U. S., 565*, one of the grounds upon which a removal was sought was that the state officers who selected the grand jurors, who returned the indictment against the defendant, were prejudiced against him on account of his being a negro, and had discriminated against his race in selecting said grand jurors. It was held that this was not sufficient to entitle him to a removal under *section 641*. There was no claim made in the petition that the *state court had decided* that such discrimination was not a violation of his civil rights.

In *Smith v. Mississippi, 162 U. S., 592*, there was a motion made in the state court to quash the indictment, which was overruled prior to the filing of the petition for removal. But this action of the court, in overruling the motion to quash, was not alleged as a ground for removal in the petition. Besides, this court held that the action of the state court, in overruling the motion to quash, was proper. It could not, therefore, amount to such a *denial* of his rights "in the judicial tribunals of the state" as would entitle him to a removal under *section 641*.

In *Murray v. Louisiana, 163 U. S., 101*, there was a challenge to the grand jury which found the indictment against the defendant, on the ground that jury commissioners in selecting it had discriminated against the class to which he belonged.

The trial court did not deny the defendant's right to demand that the grand jury which found the indictment against him should be selected without class discrimination. On the contrary, that court expressly conceded such right. It put its judgment overruling the challenge upon the ground solely that the evidence showed that no discrimination had been practiced. It held "that while it was undeniable that the exclusion from the general service of all people of the African race on account of their color would be an unlawful abridgement of the rights of such citizens, yet that the evidence did not disclose such a case, but showed that the general service was not exclusively made up of the names of white persons, and that it was clearly established that colored people were not excluded on account of their race or color."

This action of the court was ~~not~~ alleged as a ground for the removal sought. ~~Besides~~, it manifestly furnished no ground for a removal, for it was not a denial of his right to a jury selected without class discrimination.

In *Williams v. Mississippi*, *170 U. S.*, *213*, there was a motion to quash the indictment, which was overruled prior to the filing of the petition for removal. It does not appear from the report that this action of the trial court was alleged as a ground for the removal sought. Anyhow, the action of the trial court in overruling the motion to quash, was adjudged by this court to be proper. It, therefore, did not deny to the petitioner the equal protection of the laws, and hence, of course, furnished no ground for removal under *section 641*.

In none of these cases did this court decide that a *judicial* denial of his equal civil rights would not entitle a party to a removal under *section 641*.

The clause in section 641, "or in the part of the state where the suit or prosecution is pending," strongly indicates that the denial spoken of was not meant to refer to a legislative denial only. True, it is possible that an act of a state legislature denying equal civil rights might be made, by its terms, to apply to one section of a state and not to another. But such legislation would be unusual. On the other hand, it might often occur that a court in one section of the state would deny such rights, whereas the courts in other sections of the state would not.

What sort of a judicial denial then is embraced by section 641?

On principle, any judicial denial which takes place *before* "the last and final hearing" has begun, which *it is fair to presume* the court will adhere to, or follow, on "the last and final hearing," comes within the very letter of section 641.

A *legislative* denial is embraced by section 641, not because it is a *legislative* denial, for that section speaks only of a denial "in the judicial tribunals," but because it is fair to presume that the judicial tribunals will be controlled by it, not because they are actually bound to follow it, but because the *presumption is fair* that they will.

When an act of the legislature denies a right guaranteed by the fourteenth amendment, a person whose rights are thus denied can never say, with certainty, in advance of his trial, that his rights are denied "in the judicial tribunals of the state." For, it may be, the judicial tribunal will do its duty and declare the legislative enactment void. But inasmuch as the "presumption is fair" that the tribunal will not do that,

a party is entitled to a removal under a statute which gives that right where his rights *are* denied in the judicial tribunals of the state.

In case the Scott Circuit Court had in his former trials denied to Powers the equal protection of the laws, or, in other words, had denied his right to be tried by a jury selected without discrimination against the class to which he belonged, and this ruling of the Scott Circuit Court had been approved by the Kentucky Court of Appeals, undoubtedly that would have presented a typical case where he would be entitled to a removal under section 641, on the ground that his right to the equal protection of the laws was denied "in the judicial tribunals of the state."

Or if, in some other case, the Court of Appeals of Kentucky had decided that a defendant in a prosecution for a felony had no right to demand that the jury empaneled to try him should be chosen from men selected and summoned without discrimination against the class to which he belonged, that would have presented a typical case for removal under section 641. There would have been a denial in the highest judicial tribunal of the state, which would presumably have been followed by all the trial courts of the state.

The Scott Circuit Court has decided, in this prosecution, that Caleb Powers has no right to demand that the jury empaneled to try him shall be selected and summoned without discrimination against the class to which he belongs; that his sole right was to have jurors who possessed the qualifications prescribed by

the statutes of Kentucky. The Scott Circuit Court is the highest court in Kentucky that has jurisdiction to decide that question.

This record shows that Powers' right to be tried by a jury impartially selected was denied him by the sheriff and jury commissioners who selected and summoned the venires for his three trials; and also that on his second and third trials this fact was shown *to the court* by affidavits filed therein, and motions made to discharge the venires and the panel for that reason; and that the *court* overruled all these motions.

It further shows that on the third trial Powers moved the court before any veniremen were summoned, to instruct the sheriff to summon persons possessing the statutory qualifications without regard to their political affiliations. This motion the court overruled.

It further shows that on Powers' motion to discharge the first venire from Bourbon County, which was accompanied with affidavits showing that the discrimination complained of had been practiced by the sheriff and his assistants in summoning the jury, and specifically just how it had been practiced, (pp. 177 to 183 printed record,) the court overruled his motion by an order in the following words (p. 177 printed record):

"Thereupon the court overruled the motion without any reference to said affidavits and the court holds that it is not claimed in the grounds of said motion that said jurors are not sensible, discreet and sober men, and housekeepers of Bourbon County over the age of twenty-one years."

The affidavits, thus excluded from consideration by the Scott Circuit Court, showed that by a pre-arranged system of exclusion and elimination, the sheriff and the persons from Bourbon County whom he had called in to assist him, purposely passed by and refused to summon men well qualified for jury service because they were Republicans or Independent Democrats, and summoned Goebel Democrats in the same neighborhood; and the result of their work was that of the 95 men summoned on that venire, 93 were Goebel Democrats and two were Republicans.

The second venire which was summoned after the court had made this decision, refusing to discharge the first venire, was composed of 81 men, 80 of whom were Goebel Democrats, and one was a Republican.

The motions to discharge the second venire and the panel were overruled without the order reciting the grounds upon which the court did so. The fair presumption is that it was upon the same ground that the motion to discharge the first venire was overruled. That ground was that inasmuch as it was not claimed that the veniremen did not possess the qualifications required by the Kentucky statute, it was not material that in their selection Republicans had been excluded solely for the reason that they were Republicans.

In other words, the Scott Circuit Court decided, as is shown on the face of the order, that Powers had no right to complain of the manner by which that jury was thus packed, inasmuch as he did not claim that they did not have the qualifications prescribed by the Kentucky statute, and that he was

not entitled to a jury selected without discrimination against the class to which he belonged.

As said by Judge Barker in his separate opinion in this case on the last hearing thereof in the Kentucky Court of Appeals:

"It is clear that the trial judge was of opinion that it was not an offense against the fourteenth amendment or a denial of the equal protection of the laws to the defendant, to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service. There was no decision on the evidence offered as to whether or not, in fact, there had been the discrimination complained of, it being necessarily assumed that this was, if true, an immaterial circumstance."

This was not a decision that Powers' right, under the fourteenth amendment, to a jury selected without class discrimination, had not been violated by the sheriff and his assistants. It was a decision that he had no such right. It was a denial of the existence of the right, not an admission of its existence and a denial of its violation.

In the brief of counsel for petitioner, it is not contended that this is not the proper construction of that decision. Their contention is, in effect, that the evidence offered was not sufficient to prove the violation of the right claimed, because the witnesses did not state their means of knowledge.

The Scott Circuit Court did not so decide. It decided that evidence of the *violation* was immaterial, inasmuch as the *right* did not exist.

The Scott Circuit Court is the highest court in Kentucky that has jurisdiction to pass upon Powers' right to be tried by a jury selected without discrimination against the class to which he belongs.

The Court of Appeals of Kentucky has jurisdiction of the prosecution against Powers by virtue of *section 334, Criminal Code of Kentucky*, which reads:

"The Court of Appeals shall have appellate jurisdiction in prosecution for felonies, subject to the restrictions contained in this article."

Section 281 of the *Criminal Code* provides as follows:

"The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception."

The Court of Appeals in numerous cases, amongst others in this identical prosecution, has held that it has no jurisdiction, by reason of this section 281, to reverse for any error of the trial court in the selection and empaneling of a jury. *Powers v. Commonwealth, 114 Ky., 237; Turner v. Commonwealth, 80 S. W. Rep., 197; Howard v. Commonwealth, 80 S. W. Rep., 211; Hathaway v. Commonwealth, 82 S. W. Rep., 400.*

The sharp question now presented is: Is the decision of of the Scott Circuit Court, (the highest court in the state that can decide the question,) that Powers has no right to demand that the jury that tries him shall be selected without discrimination against the class to which he belongs, such a denial of his rights "in the judicial tribunals of the state" as entitles him to a removal under section 641?

It will be observed that the "denial" spoken of by section 641 is not a *future* denial, but a *present* denial. "*Is* denied" not "will be denied," is the language of that section.

In no other way could there be, at the time of the filing of a petition for removal, an *actual, then present* denial "in the judicial tribunals of the state," of the equal protection of the laws, except where some judicial tribunal of the state had theretofore decided that a party is not entitled to some right which is guaranteed to him by that clause of the fourteenth amendment, and that decision was rendered by such a court that the presumption would be fair that it would be adhered to, or followed, by the court in which the action sought to be removed was pending. For example, if the Court of Appeals of Kentucky had jurisdiction to decide, and had decided, that a party being tried for a felony had no right to demand that the jury to try him should be selected and summoned without discrimination against the class to which he belonged, that would have been, as long as that decision was not overruled by the Court of Appeals or reversed by this court, an actual present denial, in the judicial tribunals of the state, of the equal protection of the laws.

This court, in *Strauder v. West Virginia, 100 U. S., 303*, has construed section 641 to embrace, not only an *actual* judicial denial, but a *presumptive* judicial denial, a denial, not in a judicial tribunal at all, but by legislative enactment which it is *fair to presume* will be hereafter followed in the judicial tribunals.

A denial by a sheriff or jury commissioners will not raise such a presumption, for courts do not usually follow the opin-

ions of mere ministerial officers in deciding questions of law. The reason why a legislative denial will raise such a presumption, is that courts act upon the presumption that the legislature has duly considered the constitutionality of every law it enacts, and its opinion is entitled to some weight in the courts.

Courts usually follow their former decisions. Particularly is that true when the court is the highest court in the state that has jurisdiction to decide the question. Hence such former decision raises a fair presumption that it will be followed by the court that rendered it.

A court is not absolutely bound to adhere to any of its former decisions. No more is a court bound by a state statute which violates the fourteenth amendment to the federal constitution. In fact, it is the duty of a court to disregard an unconstitutional statute; and it is the duty of all courts to disregard their former decisions when they are convinced they are wrong. But inasmuch as there was a fair presumption that the courts of West Virginia would not disregard an unconstitutional statute, which deprived a defendant of his right to a jury selected without class discrimination, this court held, in *Strauder v. West Virginia*, *supra*, that he was entitled to a removal under section 641. So, when the Scott Circuit Court has deliberately decided on several occasions, and whenever the question has been presented to it, that Powers had no right to demand that the jury to try him shall be selected without class discrimination, and has put that decision, with its grounds therefor, upon its record, and that decision has never been reversed or overruled, the presumption is fair that the same court will adhere to that decision in any subsequent trials of the same case.

Even if such a decision had been made by that court in a different case, the presumption is fair that it would have been adhered to in this case. In so adhering to its former ruling, the court would simply have been applying the doctrine of *stare decisis*. That doctrine applies not to decisions of courts of last resort only. It applies to all courts.

Chancellor Kent, in *Vol. 1* of his *Commentaries*, page 475, says:

"A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the judgment, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness. * * * When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and *never by the same court*, except for very cogent reasons, and upon a clear manifestation of error."

See also *Hadden v. Natchang Silk Co., 84 Fed., 80; Wakelee v. Davis, 44 Fed., 532; Oglesby v. Attrill, 14 Fed., 214; in re Hale, 139 Fed., 496.*

It is plain that the learned chancellor, in this extract, was not speaking of the decisions of courts of last resort only, for he speaks of decisions which *may be reversed* by a higher court, and he says those decisions should be adhered to until reversed.

Caleb Powers has thus been denied the right to be tried by a jury selected without class discrimination by the Scott

Circuit Court, the only court of the state that had any power to enforce that right. The decision of that court to the effect that he had no such right as he claimed, has never been reversed. The fair presumption is that that court will not reverse its own ruling in a future trial of the same case. Therefore, Caleb Powers can say, in advance of his next trial, that he is denied "in the judicial tribunals of the state" the equal protection of the laws, with just as much ground for so doing as if there had been an unconstitutional statute of the state, which denied to him the equal protection of the laws. The presumption that a court will follow its own previous decision as long as it remains unreversed, is, at least, as strong as the presumption that it will give effect to an unconstitutional statute. The former presumption is really the stronger of the two. It rests upon the legal doctrine of *stare decisis*, whereas there is no presumption that a court will give effect to an unconstitutional statute, except such as is based on the presumption that the legislature believed it to be constitutional. The opinions of a legislature as to the constitutionality of a law certainly do not carry as much weight "in the judicial tribunals of the state" as do prior decisions of the same court, particularly when that court is the highest court in the state that has jurisdiction to pass upon the question decided.

The case presented is the same, in principle, that would have been presented, if Caleb Powers had never been tried at all, but some of the other defendants, jointly indicted with him for the murder of Goebel, had been tried in the Scott Circuit Court, and on their trials that court had decided that they did not have the right to demand that the juries empaneled to try them should be chosen from men summoned without discrimi-

nating against Republicans, because of their being Republicans. Such a decision, it is fair to presume, would have been adhered to by that court on the trial of Caleb Powers. Hence Powers could say, before his trial began, that the Scott Circuit Court *denies*, (in the present tense,) the right, which the constitution of the United States gives to him, to require that the jury to try him shall be selected from men summoned without discrimination against Republicans, on account of their being Republicans.

The circumstance that such decision was made in a former trial of Powers, instead of in a trial of some one else jointly indicted with him, does not change the principle. It only presents a stronger case for its application.

It is argued by counsel for petitioner that *it may be*, if another trial is had in the state court, the sheriff and jury commissioners *may not* discriminate against Republicans in selecting the jury. But Powers is not bound to rely for the protection of his rights under the federal constitution, on the honesty and fairness of a sheriff and jury commissioners. He is entitled to have those rights acknowledged and enforced by the *courts* of the *state*. If they are not acknowledged, but denied, by the courts, or if the courts are unable to enforce them when violated by a sheriff or jury commissioners, he is entitled, by the express terms of *section 641*, to a removal to a court that *will* acknowledge and *can* enforce them.

Dishonesty and unfairness on the part of ministerial officers whose duty it is to select and summon jurymen, will not give a party a right to remove his case to the federal court under *section 641*, as was decided in *Virginia v. Rives*, *100*

U. S., 313. And their fairness and honesty can not take away his right of removal under that section, when the court denies his right to demand that the jury empaneled to try his case shall be selected without discrimination against the class to which he belongs. The intent of Congress in enacting *section 641* evidently was to give to everybody a right to have his case tried *in a court* which recognized his right to the equal protection of the laws. Where the state does not provide him such a court, it can not deprive him of his right of removal under *section 641*, by providing him honest and impartial sheriffs and jury commissioners *in lieu* of such a court. Still less could the mere possibility that those officers might hereafter act honestly and impartially, though they had not done so in the past, take away his right to a trial in a court which would recognize and could enforce the rights given to him by the Constitution of the United States.

Counsel for petitioner in his brief criticises the petition for removal on the ground that it fails to allege, in terms, that the sheriff of Scott County will, in a future trial of Powers, discriminate against Republicans in selecting and summoning the jury. Such an allegation would have been valueless; for in the nature of things, nobody can know with certainty what the sheriff will do in the future. All the facts that can possibly be alleged, are facts that have already transpired and conditions that now exist. We can judge the future by the past and present only. Besides, it should be borne in mind that the Scott Circuit Court has already decided that the sheriff and jury commissioners did no wrong in excluding Republicans from the venire solely because they were Republicans, so long as they

selected jurymen who were sober, discreet and sensible housekeepers of the county over twenty-one years old.

It is further argued that a right to an impartial jury is not a right guaranteed by the federal constitution. I submit that the case cited, *Brooks v. Missouri, 124 U. S., 394*, does not so decide. Anyhow, a right to have the jury which the state empanels to try him selected without discrimination against the class to which the defendant belongs, *is* a right guaranteed by the federal constitution, as was decided in *Strauder v. West Virginia, supra*, and many later cases.

II.

The question yet remains:

Is Caleb Powers entitled to a removal of his case on the ground that he can not enforce, in the judicial tribunals of the state, his right to be tried by a jury selected without discrimination against the class to which he belongs?

The Court of Appeals of Kentucky has jurisdiction of the prosecution against him by virtue of *section 334 of the Criminal Code*, above quoted. He can not enforce in that tribunal that right, by reason of the fact that a state statute, to-wit, *section 281 of the Criminal Code*, takes from that court the right to reverse a judgment of the trial court for erroneously and wrongfully denying him that right.

The "judicial tribunals of the state" referred to in *section 641*, are evidently those judicial tribunals which have jurisdic-

tion of the action or prosecution sought to be removed. No valid reason can be given why those words should be limited in their meaning to courts which have original jurisdiction of the action or proceeding. The language of the section contains no such limitation, and no reason is perceived why such limitation should be put in by construction.

On the contrary there is a powerful reason why the words "judicial tribunals of the state," in *section 641*, should *not* be restricted in meaning to trial courts. The judgment of a trial court of a state can not be "re-examined and reversed or affirmed" by this court, unless that trial court is "the highest court of the state in which a decision in the suit" can be had. (*Section 709, Revised Statutes of United States.*) The Court of Appeals is the highest court in Kentucky in which a decision in the prosecution against Caleb Powers can be had. It is the judgment of that court only in the case, therefore, that may be "re-examined" by this court. The judgment of the Scott Circuit Court can not be so re-examined. (*Great Western Tel. Co. v. Burnham, 162 U. S., 342.*) It results therefore that the error of the Scott Circuit Court in denying to Powers the right to be tried by a jury selected without class discrimination,—a right which is given him by the constitution and laws of the United States,—can not be corrected, on appeal or writ of error, by any court; not by the Court of Appeals of Kentucky, because of *section 281* of the Criminal Code, and not by this court, because it can re-examine the judgment of the Court of Appeals only, which is the highest court in the state in which a decision in the suit can be had; and the Court of Appeals has never decided that Powers was not entitled to be tried by a jury selected

without class discrimination, but only that it had no jurisdiction to pass upon that question.

This court can not reverse a judgment of the Court of Appeals, because it correctly decided that it had no jurisdiction to pass on certain alleged errors committed by the trial court.

In *Fashnacht v. Frank*, *23 Wall.*, *416*, this court said:

"We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error."

Unless, therefore, the words, "judicial tribunals of the state," can be construed to embrace all the courts of the state which have jurisdiction of the case sought to be removed, then it would result that a right given to Caleb Powers by the Constitution of the United States, can be violated by the state, and can not be enforced by him in any court of the United States; not in this court on appeal or writ of error, because the judgment so violating his right was not made by the highest court in the state in which a decision in the suit could be had; not in the Circuit Courts of the United States, because that violation by the trial courts gave him no right to have his case removed to a federal court under *section 641*.

The evident object that Congress had in view in inserting this clause, "can not be enforced in the judicial tribunals of the state," in *section 641*, was to provide for cases where the state statutes deprived the state courts of jurisdiction to enforce some right given by the Civil Rights Act, or the equal protection of the laws clause of the fourteenth amendment. In cases

where the state courts did have jurisdiction to enforce such right, their failure to do so could be corrected by this court on appeal or writ of error, pursuant to *section 709, Revised Statutes of United States*. But if the trial court of the state was not given jurisdiction to enforce such right, that could not be corrected in the appellate court of the state, nor by this court on appeal or writ of error. For this court can not reverse a judgment of a state court for correctly deciding that it had no jurisdiction of a certain question. So also, if the trial court was given jurisdiction to enforce such right but the appellate court was not, though it had jurisdiction of the suit in which the right was claimed, this court could not reach, by appeal or writ of error, the error of the trial court in refusing to enforce such right. For it could only re-examine and reverse or affirm the judgment of the highest court of the state in which a decision in the suit can be had. It would result, therefore, in such a case, that the error of the trial court in refusing to enforce such right could not be corrected at all by any court, on appeal or writ of error. Congress evidently intended, therefore, that when this inability to enforce existed in the state court, whose judgment alone could be re-examined by this court, then a right of removal should be had; for otherwise a right under the federal constitution might be violated by the trial court of a state, and there would be no power in any federal court to enforce such right.

It has been argued that inasmuch as *section 281* of the Kentucky Criminal Code applies to everybody alike, it does not discriminate against Powers, and therefore it does not violate any of his rights under the United States Constitution. I

concede this. His rights are not *denied* by *section 281*. If they were, that code provision would be invalid. But the point is that his rights were denied by the State of Kentucky, acting by its subordinate officers who summoned the juries that tried him, and by the Scott Circuit Court, and *section 281* makes it impossible for him to *enforce* those rights in the Court of Appeals, although it had jurisdiction of his case. *Section 641* does not give a right of removal to those alone whose rights are *denied* by some law of the state, but also to those whose rights *can not be enforced* in the judicial tribunals by reason of some law of the state. If that law which thus forbids the enforcement of such rights is a valid law, it is a much more serious obstacle in the way of a party enforcing his rights than if it were an invalid law. The State of Kentucky had the right to give to the Court of Appeals jurisdiction of this prosecution, and to debar it from reviewing the action of the trial court in empaneling the jury. It had the right also, if it had chosen to do so, to take away from the trial court the right to question the action of the sheriff and jury commissioners; but had it done so, most certainly a case would be presented where a defendant would be entitled to a removal under *section 641*, on the ground that the statutes of the state interposed a bar to his being able to *enforce* his right to the equal protection of the laws, "in the judicial tribunals of the state." And yet, even in such a case it might be argued, with as much force as in the present case, that hereafter the sheriff and jury commissioners might act fairly and honestly in selecting and summoning jurymen.

It has been argued that if a right of removal exists in this case because of *section 281* of the Kentucky Code, every prose-

cution for a felony in Kentucky could be removed to the federal courts. If that were true, the evil could be easily remedied by a repeal of that section, or by a repeal of *section 334*, which gives to the Court of Appeals jurisdiction in prosecutions for felonies. A state cannot by one statute give one of its courts jurisdiction of a case, and by another statute deprive it of the power to enforce rights which are given to a party thereto by the Constitution of the United States, and then complain that a law of Congress gave that party a right to have his case tried in a court of the United States.

But the conclusion drawn by that argument does not necessarily follow. It may be that a party seeking to remove a case under *section 641*, on the ground of his inability to enforce his equal civil rights in the state courts, must show that some of the rights intended to be enforced by that section have been violated by the state, or such a state of facts as raises a fair presumption that they will be violated by the state.

Whatever may be the law as to that, the case of Caleb Powers is clear of any difficulty on that score. His right to be tried by a jury selected without class discrimination has been denied by the sheriff and jury commissioners of Scott County and by the Scott Circuit Court, and he *can not enforce* that right in the Court of Appeals. Whether an inability to enforce such a right in the Court of Appeals, in case it had never been denied, would have entitled him to a removal under *section 641*, does not arise in the present case.

If, in this case, the Court of Appeals of Kentucky had held that it had jurisdiction to pass upon the action of the Scott Cir-

cuit Court in deciding that Powers was not entitled to be tried by a jury selected without class discrimination, and had agreed with the Scott Circuit Court on that question, though reversing the judgment on other grounds, it would have presented a clear case within the very letter of *section 641*, where Powers could have alleged, in advance of a future trial, that he is *denied* "in the judicial tribunals of the state," the equal protection of the laws.

If a statute of Kentucky had provided that neither the trial court nor the Court of Appeals should have any right to set aside a venire summoned by a sheriff or jury commissioners, for the reason that in their selection those officers had purposely excluded all persons belonging to the same party to which Powers belonged, a clear case for removal would be presented under *section 641*, on the ground that he *could not enforce* "in the judicial tribunals of the state" his right to the equal protection of the laws.

The case at bar is one where Powers is *denied* the equal protection of the laws in one court, and a statute of the state interposes a bar to his *enforcing* his right to the equal protection of the laws in the other court.

Is such a case any less within the spirit and the letter of *section 641* than are the two supposed cases?

If it be conceded that the words in *section 641*, "in the judicial tribunals of the state," mean "in every one of the judicial tribunals of the state which have jurisdiction of the suit sought to be removed," still this case comes within the very terms of that section. For the terms of that section would

embrace a case where the *denial* was in one court and the *inability to enforce* was in the other, and those two were the only courts in the state which had jurisdiction of the suit.

It is respectfully submitted that the petition for mandamus against Judge Cochran should be denied.

E. L. WORTHINGTON,
Counsel for Defendant.

Citations of Authorities

UNCONTROVERTED ALLEGATIONS ADMITTED

Dishon vs. C. N. O. & T. P. R'y. Co., 133 Fed. Rep., 471;
Toledo Traction Co. vs. Cameron, 137 Fed. Rep., 48;
Cases cited in vol. 18 Enc. Pl. & Pr., 372.

SECTION 641, REV. STAT., IS CONSTITUTIONAL.

Strauder vs. West Virginia, 100 U. S., 303;
Neal vs. Delaware, 103 U. S., 370;
Bush vs. Kentucky, 107 U. S., 110;
Gibson vs. Mississippi, 162 U. S., 565;
Smith vs. Mississippi, 162 U. S., 592;
Murray vs. Louisiana, 163 U. S., 101;
Williams vs. Mississippi, 170 U. S., 213;
Tennessee vs. Davis, 100 U. S., 257;
Virginia vs. Rives, 100 U. S., 313;
Ex. p. Virginia, 10 U. S., 339;

WHEN REMOVAL PETITION TO BE FILED.

Home L. Ins. Co. vs. Dunn, 86 U. S., 214;
Vannevar vs. Bryant, 11 U. S., 41;
Jifkins vs. Sweetzer, 102 U. S., 177;
B. & O. R. R. Co., vs. Bates, 119 U. S., 464;
City of Detroit vs. Detroit City R'y. Co., 54 F. R., 10, opinion by Judge Taft;
Parker vs. Vanderbilt, et al., 136 F. R., 246.

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Rowland vs. Craig, Sneed, 330;
Morgan vs. Dickerson, 1st T. B. Monroe, 20.
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Sims vs. Reed, 12 Ben. Mon., 51;
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L. & N. R. R. Co., vs. Survant, 19 Ky. Law Rep., 1576;
Schmetzer vs. L. & N. R. R. Co., Id., 1713;
Commonwealth vs. L. & N. R. R. Co., 20 Id., 351;
L & N. R. R. Co., vs. Ricketts, 21 Id., 662;
L. Ins. Co. vs. Monroe, Id., 782;
Breashears vs. Letcher County, Id., 1250;
Freeman vs. Mills, 22 Id., 859;
Butler vs. Prewitt, Id., 1911;
L. & N. R. R. Co., vs. Penrod, 24 Id., 50;
Gray Tie and Lumber Co., vs. Farmers Bk., Id., 2319;
Wilson's Assignees vs. Lou. Nat. Bk. Co., 25 Id. 1065;
Booth & Co. vs. Bethel, Id. 747;
Brown vs. Crow, Hardin, 451;
Bryan vs. Bekley, Litt. Sel. Cas., 91;
Lewis vs. Lewis, 11 Ky. Law Rep., 413.

COMMON LAW DECIDES VALIDITY OF PARDON.

10 Peters, 200; 7 Peters, 150;
18 Howard, 310; 7 Wall., 582;
1 Abb., U. S., 114; 2 Abb. U. S., 395;
3 Ben., 316; 8 Blatchf., 96;
People vs. Bowen, 13 Am. Rpts., 148;
13 Am. Rep., 148; Church Habeas Corpus, sec. 458;
Ex parte Garland, 4 Wall., U. S., 333;
Cathcart vs. Robinson, 5 Peters, 264.

FEDERAL COURTS ENFORCE STATE PARDONS.

Ex parte Slauson, 73 Fed. Rep., 666;
13 Am. Rep., 148; Church *Habeas Corpus*, sec. 458;
Whitten vs. Tomlinson, 160 U. S., 231;
Iasigi vs. Van de Carr, 166 U. S., 391;
U. S. vs. Fowkes, 53 Fed. Rep., 13;
Ornelas vs. Ruiz, 161 U. S., 502;
Re Dana, 68 Fed. Rep., 886;
Re Ludwig, 32 Fed. Rep., 774;
Cook vs. Hart, 146 U. S., 183.

DE FACTO OFFICER.

Braidy vs. Teritt, 17 Kans., 471;
State Kansas vs. Durkee, 12 Kans., 308;
Ex. p. Powers, 129 Fed. Rep., 985;
Opinion Justice Harlan in Taylor vs. Beckham, 178 U. S. 548;
61 Am. St. Repts., 893; 20 Am. St. Rep., 337;
3 Am. St. Repts., 181; 19 Ind., 358;
23 Am. St. Repts., 51; 23 Ind., 449;
9 Am. St. Repts. 412; 17 Kans., 471;
37 Am. St. Repts., 829; 12 Kans., 314;
32 Am. St. Repts., 239; 1 Cranch, U. S., 454;
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People vs. Olds, 58 Am. Dec., 398;
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85 Am. St. Repts., 42; 126 Ala., 425;
28 South, 497; Cooley's Const. Lim., 135;

Cushing's Law and Proceed. of Legis. Assem., sec., 415.

STATE DECISIONS INVOLVING GENERAL PRINCIPLE NOT FOLLOWED.

Town of Venice vs. Murdock, 92 U. S., 494;
Mohr vs. Manierre, 7 Biss., 419;
Olcott vs. Supervisors, etc., 83 U. S., 678.

SAME NOT FOLLOWED WHERE CIVIL RIGHTS VIOLATED THOUGH UPON LOCAL QUESTION.

Rowan vs. Runnels, 46 U. S., 134;
Bank of Ohio vs. Knoop, 57 U. S., 369;
Jefferson Branch Bank, vs. Skelly, 66 U. S., 436.

FEDERAL RECOGNITION CONCLUSIVE.

Jones vs. U. S., 137 U. S., 202;
Woolsey vs. Chapman. 101 U. S., 755;
Runkle vs. U .S., 122 U. S., 557;
Wilcox vs. Jackson, 38 U. S., 498;
U. S. vs. Eliason, 41 U. S., 291;
Confiscation Cases, 87 U. S., 92;
U. S. vs. Tarden, 99 U. S., 10;
Marberry vs. Madison, 5 U. S., 1 Cranch, 137;
Opinions Atty. Genl., Vol. 11, page 397;
Luther vs. Borden, 48 U. S., 7 Howard, 1, et al.

Supreme Court of the United States

OCTOBER TERM, 1905.

Nos. 15 and 393.

ORIGINAL.

THE COMMONWEALTH OF KENTUCKY, - *Petitioner,*

Vs.

ANDREW M. J. COCHRAN, - - - - *Defendant.*

THE COMMONWEALTH OF KENTUCKY, - *Appellant,*

Vs.

CALEB POWERS, - - - - - *Appellee.*

BRIEF FOR APPELLEE.

The uncontroverted allegations of the first paragraph of the petition for removal are that an absolute, unconditional, valid pardon was issued, delivered to, and accepted by, appellee for the identical offense herein charged; that said pardon has been thrice denied by the highest court in Kentucky; that, therefore, he is denied or can not enforce, in the judicial tribunals of said State, the equal civil rights secured to him, as a citizen of the United States, by the laws thereof. (Record, p. 10).

Petitioner, (appellant), contends that, admitting said allegations to be true, no ground for removal exists.

UNCONTROVERTED ALLEGATIONS ADMITTED.

Unless there is a record contradiction, the sworn allegations of a petition for removal, which are not traversed, must be taken as true.

"If these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

Dishon vs. C., N. O. & T. P. R'y. Co., 133 Fed. Rep., 471; Toledo Traction Co., vs. Cameron, 137 Fed.. Rep., 48; See also cases cited in vol. 18, Enc. Pl. and Pr., p. 372.

SECTION 641 IS CONSTITUTIONAL.

In *Ex parte* Virginia, 100 U. S., 339, the courts said:

"Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the State. The mode of its enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court, where it will be acknowledged. Of this, there can be no reasonable doubt. Removal of cases from State courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the Government. Its constitutionality has never been seriously doubted."

See also, Strauder vs. West Virginia, 100 U. S., 303;
Neal vs. Delaware, 103 U. S., 370;
Bush vs. Kentucky, 107 U. S., 110;
Gibson vs. Mississippi, 162 U. S,. 565;

Smith vs. Mississippi, 162 U. S., 592;
Murray vs. Louisiana, 163 U. S., 101;
Williams vs. Mississippi, 170 U. S., 213;
Virginia vs. Rives, 100 U. S., 313;
Ex. p. Virginia, 100 U. S., 339.
Tennessee vs. Davis, 100 U. S., 257.

ARE CIVIL RIGHTS LIMITED TO ANY CLASS OF CITIZENS?

For some years after the Fourteenth Amendment was promulgated, the courts were inclined to believe that its restrictions, guaranteeing equal protection, would never be applied, except to prevent discrimination, by the States, against the negro, on account of his race or color. In 1872, when this question was first before the court in the Slaughter House cases, 83 U. S., 36, the court, by Mr. Justice Miller, said:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Similar language was also used in Strauder vs. West Virginia, 100 U. S., 303, and *Ex parte* Virginia, 100 U. S., 339, decided at the October term, 1879. These cases were erroneously construed by many of the State Courts, as actually holding that the Amendment, in the respect named, would have to be restricted in its application to questions of discrimination on account of race or color. Prominent among the opinions giving that construction, are the cases referred to in 59 Am. Repts., 488.

And, indeed, when we examine all the Acts of Congress, passed by virtue of the fifth section of the Amendment, which provides:

> "Congress shall have power to enforce by appro- private legislation the provisions of this Article,"

we conclude that Congress, too, for many years, must have believed that the application of the Amendment would be limited as stated in that part of the opinion in the Slaughter House cases cited. See Sec. 16, Act of May 31, 1870; 16 St., at L., p. 144, now Sec. 1977 *supra;* and the Act of March 1, 1875; 18 St. at L., 335; Comp. St., 1901, p. 1259, and last clause of Act of June, 1879, Sec. 2; 21 St. at L., 43; Comp. St., 1901, p. 624; and Sec. 17 of the Act of May 31, 1870, now Sec. 5510, Rev. St., U. S.

All of these statutes secure to persons the right not to be discriminated against on account of race or color; and, except the right secured to aliens by the last-cited section, no other rights are specifically secured by any of them. If it were not that the Amendment operates by its own force, many, in fact, a large majority, of the most important rights secured by the Amendment could not now be enforced in the courts. But, the preamble to the Act of Congress of March 1, 1875, to enforce the Amendment, shows that Congress never believed that the Amendment would necessarily have to be restricted to questions of race, etc. Said preamble is as follows:

> "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of the government in its dealings with the people to mete out equal and exact jus-

tice to all, of whatever nativity, race, color or persuasion, religious or political, and it being the appropriate object of legislation to enact great fundamental principles into law, therefore," etc.

This court has long since discarded the view, limiting the operation of the Amendment to questions of race and color. By later descisions, it has held, without qualification, that its provisions apply to every form of State action, legislative, political or judicial, regardless of race or color, and to the official acts of every State officer, as well, and to the benefit of all persons within the jurisdiction of any State.

In the case of Holden vs. Hardy, 169 U. S., 366, decided February 28, 1898, the court, by Mr. Justice Brown, said:

> "This Amendment was first called to the attention of this court in 1872, in an attack upon the constitutionality of the law of the State of Louisiana, passed in 1869, vesting in a slaughter house company therein named the sole and exclusive privilege of conducting and carrying on a live stock landing and slaughter house business, within certain limits, specified in the Act, and requiring all animals intended for sale and slaughter to be landed at their wharves, or landing places. (Slaughter House Cases, 83 U. S., 16 Wall., 36). While the court in that case recognized the fact that the primary object of this Amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom, the further fact that it was not restricted to that purpose, was admitted both in the prevailing and dissenting opinions, and the validity of the Act was sustained as a proper police regulation for the health and comfort of the people. A majority of the cases which have since arisen have turned, not upon a denial to the colored race of rights therein secured to them, but upon alleged discrimination in matters entirely out-

side of the political relations of the parties aggrieved."

All of the courts now hold that the Amendment confers upon artificial persons the same protection of equal rights that it confers upon natural persons, although it was eighteen years after its adoption before it was held to apply to corporations.

Mo. Pac. R. R. Co. vs. Mackey, 127 U. S., 205;

Santa Clara County vs. Sou. Pac. R. R. Co., 116 U. S., 394;

Pembina Con. Silver Min. etc. Co., vs. Penna., 125 U. S., 181.

And its application has become so general that no case now attempts to specify or define the rights that can be asserted under it. This honorable court has thought it wise to leave these rights to be determined "in each case, as presented for adjudication."

WHAT IS MEANT BY EQUAL CIVIL RIGHTS?

Equal civil rights, or the equal protection of the laws guaranteed by the Amendment, have been defined in the Kentucky Railroad Tax Cases, 155 U. S., 321, as requiring "the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

In the case of Holden vs. Hardy, 169 U. S., 366, the court declares the Amendment to mean that all persons "shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

"The equal protection of the laws is a pledge of the protection of equal laws." Yick Wo vs. Hopkins, 118 U. S., 356.

In Ho Ah Kow vs. Nunan, a Chinaman was imprisoned for violating a law of California. The sheriff cut off his queue. He sued the sheriff in the United States Circuit Court for the District of California, alleging that it is the custom of Chinamen to shave the hair from the front of the head, and wear the remainder braided into a queue; that to deprive him of his queue is regarded by his countrymen as a disgrace and, according to their religious faith, is attended with misfortune, and suffering after death. The sheriff set up, in defense, an ordinance requiring that the hair of all prisoners should be "cut or clipped to a uniform length of one inch from the scalp." Circuit Justice Fields, sustaining a demurrer thereto, held that the ordinance imposed an unequal punishment upon the Chinaman, because of the great value he placed upon his queue; that it was a discrimination in violation of the equal protection clause of the Amendment, and the ordinance therefore void.

Ho Ah Kow vs. Nunan, 6546 Fed. Cases.

In Gandolfo vs. Hartman, et al., U. S. Circuit Court, Souther District of California, it was held that a covenant in a deed not to convey to a Chinaman is void, as a discrimination against the Chinaman, in violation of the Amendment.

A STATE, BY ITS JUDICIAL TRIBUNALS, CAN NOT DENY TO A CITIZEN OF THE UNITED STATES "A RIGHT SECURED TO HIM BY ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS OF THE UNITED STATES."

A discussion of this question necessarily brings to the front the further question: What rights do the constitution and laws of the United States secure to persons charged in a State court with a violation of a State law?

For answer, resort must be had to the constitution itself, to discover its provisions creating or securing such rights.

Going to the constitution, we find nothing directly applicable, in either the original draft, or the first twelve Articles of Amendment. The Thirteenth Article relates solely to the subject of slavery, and has no application. The first section of the Fourteenth Article of Amendment is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

It will be noticed that the prohibitions of this Amendment refer to State action, exclusively, and not to the action of individuals. The State is prohibited from

denying to any person within its jurisdiction, the equal protection of the laws; therefore, all legislation to enforce this Amendment is intended for protection against State infringement.

In Bowman vs. Lewis, 101 U. S., 22 ,the court said:

"It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights, without due process of law, nor deny to any person the equal protection of the laws."

In Pace vs. Alabama, 106 U. S., 583;

"That it, (the Fourteenth Amendment), was to prevent hostile and discriminating State legislation against any person or class of persons. Equality and protection, under the laws, applies not only to accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that, in the administration of criminal justice, he shall not be subjected for the same offense to any greater punishment."

And in Moore vs. Missouri, 159 U. S., 673;

"The Fourteenth Amendment means, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances."

As pertinently stated by Mr. Guthrie, in his work on the Fourteenth Amendment, pages 107-8:

"In proposing the Fourteenth Amendment, its framers pointed out that equality, although the 'very spirit and inspiration of our system of government, the absolute foundation upon which it was established,' was no where adequately secured, and that it had, in many instances, been denied by the States; and they urged the adoption of a measure which would guarantee equality in the future. In order, therefore, to secure this equality before the law, the Reconstruction Committee placed at the end of Section 1, a clause providing that no State should 'deny to any person within its jurisdiction the equal protection of the laws,' and this has been interpreted to be 'a pledge of the protection of equal laws.' The provision supplemented and completed the guaranties embodied in the requirement of due process of law; and the framers of the Fourteenth Amendment contemplated that this guaranty of the equal protection of the laws would have the broadest scope. It will probably be found in the future to be the most important and far-reaching of the provisions of this Amendment, and to protect where due process of law would be found inadequate fully to conserve our civil and political liability."

WHAT INTERPRETATION IS PLACED UPON THE WORDS, "AT ANY TIME BEFORE THE TRIAL OR FINAL HEARING OF THE CAUSE," AS FOUND IN SECTION 641?

On this point, counsel for the State appear to make no further question.

In the case of Fisk vs. Henarie, et al., 142 U. S., 459, it is held that, after a cause has been tried three times in the State court, an application for removal is too late, under the Acts of Congress, by virtue of which the removal was had in that case. This makes it necessary to examine the statute on which the removal was based, compare that statute with Section 641, and discover the difference.

The Fisk case involved a construction of the Act of March 3, 1887, 24 Stat. at L., 552, as corrected by the Act of Augu. ' 13, 1888, 25 Stat. at L., 435. That Act provided that the petition should be filed "at any time before the trial" of the case.

In commenting upon the Act, and its bearing upon previous statutes, the court referred to the following:

1. The Judiciary Act of 1789, which provided that the petition for removal should be filed "at the time of entering his appearance in such State court." (1 Stat. at L., 79).

2. The Act of July 27, 1866, relating to separable controversies which fixed the time for filing the petition for removal "at any time before the trial or final hearing of the cause." (14 Stat. at L., 306).

3. The Act of March 2, 1867, relating to prejudice or local influence, which provided that the petition for removal should be filed "at any time before the final hearing or trial of the suit." (14 Stat. at L., 558).

4. Section 639, Revised Statutes of the United States, the first sub-division of which is a re-enactment of the twelfth section of the Judiciary Act, the second, of the Act of July 27, 1866, and the third of the Act of March 2, 1867. This section fixes the time for filing the petition for removal "at any time before the trial or final hearing of the suit."

5. The Act of March 3, 1875, which provided that the petition should be filed "before or at the term at which said cause could be first tried, and before the trial therof." (18 Stat. at L., 470).

It will be noticed that Congress dropped the word "final" in the last Act. The effect of dropping it was determined in the following cases:

Gregory vs. Hartley, 113 U. S., 742;
Alley vs. Nott, 111 U. S., 742;
Laidley vs. Huntington, 121 U. S., 179.

All of them hold that, if the trial court had set aside a verdict and granted a new trial, or if the Appellate Court had reversed the judgment and remanded the case for trial *de novo*, it was too late to apply to remove the cause.

But the opinion in the Fisk case, *supra*, can now have no effect upon the question of removal. The case at bar must be dicided by the language in Section 641, which was brought into the Revised Statutes from the Acts of May 31, 1870, 16 Stat, at L., 144; April 9, 1866, 14 Stat. at L., 27; March 3, 1863, 12 Stat. at L., 756, and May 11, 1866, 14 Stat. at L., 46. This Section provides that the petition for removal may be filed "at any time before the trial or final hearing of the cause," and must, therefore, be controlled by the following cases:

Home L. Ins. Co. vs. Dunn, 86 U. S., 19 Wall., 214;
Vannevar vs. Bryant, 88 U. S., 21 Wall., 41;
Jifkins vs. Sweetzer, 102 U. S., 177;
B. & O. R. R. Co., vs. Bates, 119 U. S., 464;
City of Detroit vs. Detroit City Ry. Co., 54 F. R., 10, opinion by Judge Taft.
Parker vs. Vanderbilt, et al., 136 F. R., 246.

These last cases hold that it is not too late to apply for removal, even though there have been former judgments and reversals, when the statute reads as does Section 641.

The case of Bush vs. Kentucky, 107 U. S., 110, was removed from the State court, under Section 641, after

a reversal by the Court of Appeals of a judgment in the trial court.

No jurisdiction or right covered by Section 641 is repealed or affected by the Act of March 3, 1887, as amended by Act of August 13, 1888, by provision of section 6 of that Act.

WAS THE CASE AGAINST APPELLEE PROPERLY REMOVED TO THE FEDERAL COURT FOR TRIAL?

We will limit a discussion of this question to the first paragraph of the petition for removal. (Record p. 10.)

The cases of Strauder vs. West Virginia, 100 U. S., 303; Virginia vs. Rives, 100 U. S., 313; *Ex parte* Virginia, 100 U. S., 339; Neal vs. Delaware, 103 U. S., 370; Gibson vs. Miss., 162 U. S. 579, hold that the Amendment is much broader than Section 641; that many rights are protected by the Amendment, a denial of which by the State, *during the trial*, can not constitute grounds for removal. These cases seem to hold that, as the cause for removal must, under the Act, exist *before the trial or final hearing* of the cause, that *that* cause must necessarily be a denial of equal civil rights by either a law or a constitutional provision of the State. The first paragraph of the petition for removal, herein, fully meets, as we believe, all the requirements of these decisions, even though they do require a *law* or constitutional amendment to justify the removal. It alleges that certain *laws of Kentucky* stand between appellee and the courts of the State, and force the latter to deny the former the equal protection of the laws secured by this Amendment.

Said paragraph states that, on March 10, 1900, and before appellee was indicted, a warrant for his arrest, having been issued on the 9th day of that month, he was granted by Wm. S. Taylor, the duly elected, and, by the Executive officials of the United States, the duly recognized Governor of Kentucky, and had duly accepted, a valid pardon for the identical offense covered by the indictment against him; that the failure of the said State courts to recognize and hold said pardon effective, denies to him the equal protection of the laws of Kentucky, for the reason that no other pardon, granted by any Governor of Kentucky, has ever been held by any Kentucky court to be non-effective; that, in each of the three trials, he presented and claimed the full benefit of said pardon; that each time the trial court refused to recognize same, or to allow him to introduce it, in any way, or for any reason; that the action of the trial court in each one of said trials has been approved by the Court of Appeals, the highest court of the State of Kentucky, by opinions which have been reported and are now a portion of the printed laws of the State; that these opinions are the law of his case, made so by the general laws of the State; that the State court in which the prosecution is pending, is, and in future trials will be, bound by these decisions; and that, in consequence thereof, he is denied equal civil rights by the laws of Kentucky.

The authority of the Governor of Kentucky to grant a pardon is created by section 77 of the constitution of said State, which provides that the Governor "shall have power to remit fines and forfeitures, ... grant reprieves and pardons, except in cases of impeachment." This

same provision existed in the constitutions of Kentucky, preceding the one now in force. See Art. 2, Sec. 10 of First, and Art. 3, Sec. 11 of the Second, Constitution of Kentucky.

Of such pardons, the Court of Appeals in case of Commonwealth vs. Bush, 2 Duvall, 265, said:

> "But, in all cases alike, the exercise of the Executive prerogative of remission or pardon, relieves from the *offense*, and discharges the accused from its legal penalties; and this may be done as well and effectually before as after formal conviction."

In the first opinion of the Kentucky Court of Appeals, in Powers vs. Commonwealth, that court, discussing the pardon to appellee, said:

> "On the trial, a pardon was produced, purporting to have been issued by W. S. Taylor, as Governor of Kentucky, dated March 10, 1900. The production of this paper was accompanied by what is termed in the record 'a plea of pardon.' As we understand the law, no plea was necessary. The simple production of a valid pardon of the offense whereof appellant was charged, would put an end to the proceedings, and render void any proceeding thereafter taken in the trial.
>
> "In order to decide the validity of the paper produced as a pardon, we must consider the situation at the time it was issued. This court takes judicial notice of the official signature of any officer of this State, (Ky. Stat. section 1625), and is presumed to know judicially who is the Executive of the State, at any time the fact is called in question. (Dewees vs. Colorado Co., 32 Tex. 570). See also 12 Am. & Eng. Enc. Law, p. 152, ad notes. It is conceded by counsel upon both sides that the court can take judicial cognizance of the facts necessary to the decision of this question." 110 Ky. Rep., pp. 399-400.

The court then proceeds to recite the contest be-

tween W. S. Taylor and Wm. Goebel for the office of Governor, and the alleged final decision of the Legislature in settlement of that contest, and concludes the subject by saying: "that decision,"—the decision of the Legislature, as claimed,—"settled the question finally, and the pardon must be adjudged invalid." Id. 403.

In the second opinion, the court said:

> "It is again argued that the pardon issued by Wm. S. Taylor, professing to be acting as Governor of the Commonwealth, on the 10th day of March, 1900, remitting the penalty, and pardoning appellant of this crime, is good, at least as the act of *a de facto* officer; that Taylor was actually then in possession of the office, and archives, and was exercising the prerogatives of the office of Governor, and as such *de facto* officer his acts, as between all others, are valid. This question was also fully and carefully considered by the court on the former appeal; and the ruling then, made, for the reasons then assigned, is adhered to." Ky. Repts. vol. 114, 273.

In the third opinion, the court said:

> "We find that now, as upon both of the former hearings, the validity of the pardon issued by W. S. Taylor to the accused, for the offense with which he stands charged, is urged in bar of the prosecution against him. * * * All of these questions were directly passed upon on the former appeals, as were most of the questions of the admission and rejection of testimony." * * * Pardon rejected. Ky. Law Rep'r, vol. 26, p. 1112.

That the foregoing decisions of the Kentucky Court of Appeals are binding upon all of the courts of Kentucky, and must, by those courts, be regarded as the inexorable law of this case, has been decided by the following, as well as many other cases:

Rowland vs. Craig, Sneed, 330;
Morgan vs. Dickerson, 1st T. B. Monroe, 20;
Legrand vs. Baker, 6th Id., 235;
Sims vs. Reed, 12 Ben. Mon., 51;
Gray vs. Dickinson, 11 Ky. Law Rep., 890;
L. & N. R. R. Co. vs. Survant, 19 Ky. Law Rep., 1576.
Schmetzer vs. L. & N. R. R. Co., Id., 1713;
Commonwealth vs. L. &. N. R. R. Co., 20 Id., 351;
L. & N. R. R. Co. vs. Ricketts, 21 Id., 662;
L. Ins. Co., vs. Monroe, Id., 782;
Breashears vs. Letcher County, Id., 1250;
Freeman vs. Mills, 22 Id., 859;
Butler vs. Prewitt, Id., 1911;
L. & N. R. R. Co. vs., Penrod, 24 Id. 50;
Gray Tie and Lumber Co., vs. Farmers Bk., Id., 2319;
Wilson's Assignees vs. Lou. Nat. Bk. Co., 25 Id. 1065;
Booth & Co. vs Bethel, Id., 747;
Brown vs. Crow, Hardin, 451;
Bryan vs. Bekley, Litt. Sel. Cas., 91;
Lewis vs. Lewis, 11 Ky. Law Rep., 413.

EQUAL CIVIL RIGHTS ARE DENIED BY STATE DECISIONS, NO LESS THAN BY STATE ENACTMENTS.

It was contended by counsel that the law of the State, denying Civil rights, must be a statute of the State. That position is not tenable. In Neal vs. Delaware, *supra*, the court said:

> "Had the State, since the adoption of the Fourteenth Amendment, passed any statute in conflict with its provisions, or with the laws enacted for their en-

forcement, or *had tis judicial tribunals, by their decisions,* repudiated the Amendment as a part of the supreme law of the land, or declared the Acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was a denial, upon its part, of equal civil rights, or such an inability to enforce them in the judicial tribunals of the State as, under the constitution, and within the meaning of section 641, would authorize a removal of the suit or prosecution to the Circuit Court of the United States."

In Bush vs. Kentucky, 107 U. S., 110, opinion by Justice Harlan, in determining what was the law of Kentucky within the meaning of Section 641, the court considered, among other things, the opinion of the Kentucky Court of Appeals in Commonwealth vs. Johnson, 78 Ky., 511, and held that, as said opinion had declared that the statutes of Kentucky, excluding negroes from grand and petit juries because of their race, was unconstitutional, said opinion, and not the statutes, was to be regarded as the law of the State.

FEDERAL COURTS MUST ENFORCE VALID STATE PARDON, WHEN DENIED BY HIGHEST STATE COURT.

When the common law of England was adopted as a part of our jurisprudence, the pardoning power, as exercised by the British Crown and Parliament, was as well understood, as established. Before the Revolution, it was exercised in those parts of this country which were British Colonies. The same power, in its essential elements, has been conferred upon the Executive of our States and Nation.

"It is the intention of the Constitution that each of

the great co-ordinate departments of the Government ----Legislative, Executive, and Judicial----shall be, in its sphere, independent of the others. To the Executive, alone, is entrusted the power to pardon, and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned, and removes all its penal consequences." From opinion of Chief Justice Chase in United States vs. Klein, 13 Wall., 128, (80 U. S.)

These words are as applicable to the Constitution of Kentucky.

When, therefore, the validity and effect of a pardon are to be determined, the established principles of the common law will control, in State and Federal courts, in the absence of enactment to the contrary. If not the first, in establishing these principles, certainly the leading case is that of the United States vs. Wilson, 7 Peters, 150, opinion by Chief Justice Marshall, accepted as conclusive. Cited at its conclusion are:

10 Peters, 200;
18 Howard, 310;
7 Wall., 582;
1 Abb., U. S., 114;
2 Abb., U. S., 395;
3 Ben., 316;
8 Blatchf., 96.

"The pardoning power, whether exercised under the Federal or State constitutions, is the same in nature and effect as that exercised by the representatives of the British Crown in colonial times in this country."

People vs. Bowen, 13 Am. Repts., 148;
Church on *Habeas Corpus*, section 458.

"When the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eve of the law the offender is as innocent as if he had never committed the offense." *Ex parte* Garland, 4 Wall, U. S., 333.

A citizen of the United States is arrested, and tried for a State offense, notwithstanding he holds a valid pardon, which is denied recognition in the highest State court. In legal contemplation, an innocent man is thrown in prison. Can the Federal courts restore his liberty, either by (1) *habeas corpus*, or (2) removal proceedings? In the latter, a trial can be had upon the merits of the charge, and the pardon, heard upon its merits, can be offered in arrest of judgment, if need be, from any cause. As we conceive, either proceeding is available.

"The language used in the Constitution to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the Chief Executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to its exercise in the various forms, as may be found in the English law-books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the preorogatives exercised by the Crown. Hence, when the words, 'to grant pardons,' were used in the Constitution, they convey to the mind the authority as exercised by the British Crown, or by its representatives in the Colonies. At the time, both Englishmen and Americans attached the same meaning to the word 'pardon.' In the convention which framed the Constitution, no effort was made to change its meaning, although it was

limited in cases of impeachment. We must then give the word the same meaning as prevailed here, and in England, at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in Cathcart vs. Robinson, 5 Peters, 264; Flavell's Case, 8 Watts & Serg., 197, Att'y Gen. Brief."

Ex parte Wells, 18 Howard, 310.

Facts in last-cited case were that President Fillmore had commuted the death sentence of William Wells to imprisonment for life. He accepted the pardon, with that condition. Subsequently, his counsel applied for writ of *habeas corpus* upon the ground that the pardon was absolute, and the condition void, because the Executive could not impose a sentence of imprisonment, after the pardon had become effective. The writ was denied because it was held that the President could impose the condition, could grant conditional pardons, as a proper exercise of the pardoning power. But, the right to relief in the Federal court, if condition void, was no where questioned.

See also Greathouse Case, 2 Abb. U. S., 385.

In the case of Ex parte Slauson, a citizen of Virginia was arrested on inter-State extraordition proceedings, as a fugitive from justice from the State of Tennessee, upon the charge of the "fraudulent appropriation of money." Slauson sued out a writ of *habaes corpus* before the Federal Judge for the Eastern District of Virginia. *Held,* that facts recited in affidavit upon which requisition issued did not constitute the crime charged, did not constitute any crime, and the prisoner was discharged.

Ex parte Slauson, 73 Fed. Rep., 666;

Recognizing the same doctrine see,

Whitten vs. Tomlinson, 160 U. S., 231;

Iasigi vs. Van de Carr, 166 U. S., 391.

A Federal court can inquire into the lawfulness of an arrest for an extraditable offense. Such an inquiry opens the broad field to all defences allowed the prisoner, including pardon. On right of Federal court to inquire into ground upon which conviction could be had, on requisition from another State, see

U. S. vs. Fowkes, 53 Fed. Rep., 13;

Ornelas vs. Ruiz, 161 U. S., 502;

Ex parte Slauson, 73 Fed. Rep., 666;

Re Dana, 68 Fed. Rep., 886;

Re Ludwig, 32 Fed. Rep., 774;

Cook vs. Hart, 146 U. S., 183;

Though extradition cases, the principle is here established.

In the case at bar, a removal is asked because there has been a final determination in the State court which denies equal civil rights, in the plain language of section 641, Revised Statutes. The issue, delivery and acceptance of a valid pardon being admitted, the refusal of the courts of Kentucky to recognize same is a discrimination against appellee, a denial of the equal protection of the laws secured by the Fourteenth Amendment, because a denial of the benefit of the pardoning power, which must operate upon all alike. This broad statement is made in the light of the fact that the allegations of the petition for removal must be taken as true.

PART II.

The record admissions of the allegations of the petition for removal limit the scope of the present inquiry, and the adjudication to be predicated upon their truth.

We believe, therefore, that the foregoing facts, and authorities in support, thereof, constitntute the whole field of judicial inquiry as to the first paragraph, thereof, and that this brief could well be closed here; but, the position of opposing counsel will now be considered.

With all deference, we respectfully submit that the consideration of the merits of the pardon, when the record admits its validity, is unjustifiable. As well argue questions admitted on demurrer. Counsel who have admitted, by failure to traverse, the validity of the pardon, now deny it. That issue should have been made, and the question tried out, in the court below. An issue on the merits of the pardon cannot, for the first time, be made here. The record is made up. And there has been no decision by the State as to who was Governor when same issued, in order for counsel to argue, as they do, that said decision is a local one, which this court should follow. If said State court, *with jurisdiction,* had decided who was then Governor, we concede that such decision would be a local question, but that court said that it had no such jurisdiction and did not undertake to decide the question. On the other hand, we do not understand that counsel take the position that a decision upon the validity of a pardon, decides a local question, which finding, this court will follow. They evade that position. Concede that a State court takes judicial cognizance of a State

officer whose *title* is not questioned; the failure to recognize a pardon does not determine the title to the Governorship, nor does it make a decision on the pardon a local one, peculiar to that State, as counsel intimate. We quote from their brief:

> Page 3. "On Powers' appeal from his first conviction the Court of Appeals of Kentucky held that Wm. S. Taylor was not Governor on March 10, 1900, when he assumed to grant a pardon to Powers, and that the pardon was therefore not valid."

> Page 4. "They, (the Appellate Court), referred to their former decision in Taylor vs. Beckham, 108 Ky., 278, in which they held that the judgment of the Legislature was final and conclusive, and not open to judicial review, and said: 'That decision settled the question finally and the pardon must be adjudged to be invalid.'"

> Page 4. The next sentence is: "The foregoing decision of the Court of Appeals of Kentucky, that Taylor was not Governor of the State on March 10, 1900, presents no Federal question, and, if erroneous, denies no right secured to him by the constitution and laws of the United States."

> Page 5. "It must be regarded as settled by the decision of the Court of Appeals of Kentucky in Powesr vs. Commonwealth, 110 Ky., 386, and by the judgment of this court in Taylor vs. Beckham, 178 U. S., 548, that the decision of the Legislature of Kentucky, in the proceeding between Beckham and Taylor to contest the election for Governor, was final, and not subject to review by any court, State or Federal."

Counsel here twice alternately assert:

1. That the court decided that Taylor was not Governor when pardon issued;
2. That the court decided that the action of the

Legislature, on the contest for Governor, was not subject to review.

The question on Powers' appeals was the validity of the pardon. Counsel deduce, by their inexorable logic, that, because the court held the pardon invalid, therefore Taylor was not Governor when he issued it, thereby ousting him collaterally, as though it could not have been held invalid for non-delivery, non-acceptance, etc., without involving, as it could not, the title of the incumbent, and his acts as to third parties, and for the State. Attention is called to these assertions of counsel in order to emphasize the fact that the Court of Appeals never decided, at any time, that Taylor was not, or that Beckham was, the Governor of Kentucky. The question of the title to that office was never before that court but in the single case of Taylor vs. Beckham, in which the court decided that it had no jurisdiction. What the court actually decided was condensed, in conclusion, the Chief Justice writing, as follows:

> "For these reasons, we are of the opinion that the courts of this State are without authority to enter into the inquiry sought in this case, and that the journals of the General Assembly are conclusive of the controversy. The judgment of the lower court, being in accordance with these views, is therefore affirmed." Taylor vs. Beckham, 108 Ky., 306.

That opinion was rendered on April 6, 1900, and Powers was pardoned twenty-seven (27) days before that date, on March 10, 1900.

The following section of the State statute, which provides for contests for Governor, has been quoted, as though conclusive:

> "When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is *not* adjudged to another, it shall be deemed vacant."

Assuming that the Legislature did determine the contest, which we deny, the office *was* "adjudged to another," and, under the express words of the statute, it could *not* "be deemed to be vacant." The incumbent could rightfully retain possession, under the statute, as shown later.

The remainder of said section, "his powers shall immediately cease," must be construed to mean that his powers, as between himself and the successful contestant, should cease; and, that the incumbent could not thereafter be the beneficiary of his own acts, as to emoluments, or otherwise.

The principles of law determining the acts of a *de facto* officer, so far as they bind the State,and affect the life, liberty, or property of third parties, are too well established, both in reason and as a necessary part of government, to be repudiated by a State statute. If so, that part thereof, in conflict with such principles, is unconstitutional.

When an officer has been lawfully inducted into office, and holds actual possession, thereof, claiming title by virtue of a certificate of election, his authorized official acts, until legally and actually ousted, are binding upon the State and third persons, regardless of the alleged determination of a contest. His powers continue, as originally invested, pending any litigation that may properly ensue, and it is his duty to hold said office until title thereto is finally adjusted. Authorities on *de facto* of-

ficers are very numerous. Referring to list at beginning of this brief, we quote these as especially applicable:

In the circuit court case of United States vs. Mitchell, 136 F. R. 896, the court, discussing the eligibility of a district attorney, said:

"He is a *de facto* officer, and is entitled to continue in the office until it is judicially declared by a competent tribunal, in a proceeding for that purpose, that he has no right to it. 8 Ency. of Law, 788, citing a large number of cases. In the case of *In re* Manning, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264, a conviction is uphled which was had in a trial before a *de facto* judge of a court *de jure*. The case was from Wisconsin, where the rule is recognized in a long series of decisions that 'if the office has been lawfully established and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein can not be successfully attacked in collateral proceedings, but in all such proceedings will be valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office.' The rule is required by public policy. As stated by Justice Story in the Bank of United States vs. Danbridge, 12 Wheat. 64, 6 L. Ed. 552: For the purpose of 'upholding transactions intimately connected with the public peace and the security of private property,' the law indulges in its own presumptions; 'thus it will presume that a man acting in a public office has been rightfully appointed; that entries made in public books have been made by the proper officer,' etc."

"We have also held, (12 Kans., 308), that the officer *de facto* is the proper person to hold the office pending any contest therefor."

Braidy vs. Teritt, 17 Kans., 471, opinion by Justice Valentine, Justice Brewer concurring.

In the case of 12 Kans., 308, referred to, it was held:

"The interests of the public require that the duties

and functions of a public office should be performed by some one ,as well during the pendency of litigation concerning the right to such office, as at other times.

"In an action in the nature of *quo warranto*, against officers *de facto*, who claim to be officers *de jure*, it is not error for the judge of the court below to dissolve a temporary injunction granted to restrain said officers *de facto* from exercising the duties and functions of their respective offices, pending the litigation."

State of Kansas vs. Durkee, 12 Kans., 308.

This case illustrates the principle. One cannot enjoin public officers, and stop the wheels of government. "The king never dies."

In *Ex parte* Powers, 129 Fed. Rep., 385, United States District Judge Evans, holding said pardon valid, said:

"It goes without saying, in my judgment, that every citizen of Kentucky, equally with all of his fellows, is entitled to the benefits of a free and full pardon given by a Governor, either *de jure* or *de facto*. If he be the acting Governor, under color of law, his acts, upon every principle of law known to me, are effective, and particularly so until after his title to the office has been finally adjudged to be invalid. See *In re* Henry Ward, 173 U. S., 454, 19 Sup. Ct. 459, 43 L. Ed. 765. Can one citizen alone be denied the benefits of such a pardon, while all others have the rights to such bnefits, and still not be deprived of the equal protection of the laws? is a most important inquiry."

Justice Harlan, in Taylor vs. Beckham, 178 U. S., 548, said:

"It cannot be doubted that the certificate awarded to Taylor established at least his *prima facia* right to the Governorship.

Taylor, having received his certificate of election, based upon the returns of the Secretary of State, took

the oath of office as Governor, on December 12, 1899 ----the oath being administered by the Chief Justice of the Court of Appeals of Kentucky----and entered upon the discharge of his duties, taking possession of the public buildings, provided for the Governor, as well as of the books, archives and papers committed by law to the custody of that officer. After that, and until he was lawfully ousted, his acts as Governor, in conformity to law, were binding upon every branch of the State government, and upon the people."

A more firmly established governmental principle, in which the law of *de facto* officers as a necessary part of government, takes its root, is to be found in the nature of sovereignty itself, common to the governments of our States and Nation, and having its origin in the government of England. The law ascribes to British sovereignty an absolute immortality. The English government is a corporation sole, for purposes of perpetuity. In that respect, our States and Nation are molded in its exact likeness. When title to an office is contested, the incumbent remains clothed with its powers, as originally invested, pending litigation, and until final adjudication. The institution of a contest does not cause the office to shift to the contestant, who may be ultimately held not entitled. Public business must be transacted as well during such litigation as at other times. There can be no interregnum. Some one must ever represent the sovereign power. A contest merely determines the *right* to the office as between the claimants. The successful party cannot discharge the duties so long as the office remains in the adverse possession of his opponent, who has had, and retains, the legal *indicia* of title. A State statute can not over-ride these general principles, especially, if

rights of third parties have intervened, but must be subordinated to, and construed consistently with, them.

OPPORTUNITY TO PROVE PARDON VALID.

Aside from record admission of the fact of Federal recognition of the Taylor administration, and the general principles of law as to *de facto* officers, and the perpetuity of sovereignty, the validity of the pardon could have been tested upon its merits, had counsel traversed the allegations of the petition for removal. It has been, and can be, shown that the Kentucky Legislature never determined the contest for the Governorship; that no original Legislative journals can be produced to establish that fact, and that none were ever kept by either House thereof; that the State Librarian, the custodian of original journals if in existence, has never had any original journals of that session of the Kentucky Legislature, and can now produce only what purport to be printed copies of originals that do not exist, and were never kept. Said pretended "copies" were printed sixty days after the Legislature had adjourned, and were never approved by said body to give them the sanction of verity. A Legislative journal must be a bound volume, prepared by the clerks, that becomes a permanent record. Neither original bills and resolutions, as introduced, nor the original notes as taken down by the clerks, are competent to show Legislative action. (85 Am. St. Repts., 42, and others). But even these can not be produced as to that session of the Legislature.

Furthermore, it has been, and can be, proved, by those reported to have participated in said alleged determination of said contest, that it was never, in fact,

determined by either House of that body, in separate or joint session. It is competent for a third party, whose rights are involved, to prove that no such action was taken, and there are no Legislative journals to establish the fact. If the judicial tribunals of a State can not, upon a local question, deny guaranteed constitutional rights, assuredly Legislative action can not. Yet, it does, though said action was never taken. (See authorities, p. 38).

TITLE TO OFFICE NOT DETERMINED BY SUIT BETWEEN A AND B.

It is well settled that title to an office can not be determined in a suit between A and B. The judgment in such a suit binds the parties therto, but them only. To be conclusive upon all the world, it must be by *quo qarranto*.

In addition to authorities cited, see also:

People vs. Olds, 58 Am. Dec., 398;

Marke vs. Wright, 13 Ind., 548;

Cochran vs. McCleary, 22 Iowa, 75;

Updegraff vs. Crane, 47 Penna, St., 103, et al.

In the contest between Taylor and Beckham, each sued the other, and the suits were consolidated; the existence of and recitals in original Legislative journals were alleged, and admitted on demurrer; the prevailing opinion of this court was that office was not property, and there was no right of "life, liberty, or property" to give the court jurisdiction. The decisions, therefore, that the courts had no jurisdiction, left the contest where the Kentucky Legislature had left it. Conceding that the Legislature decided the contest, such action is not a judi-

cial determination, which this court regards as the action of a State court. The rule that decisions of State courts are followed on purely local questions does not include what a State Legislature may, or may not, do. Such action, if taken, is not a judicial determination.

Counsel contend that as the Court of Appeals decided that the pardon was invalid, they therefore decided that (1) Beckham was Governor, when it issued, and that (2) said decision is a local one, which this court will follow. We do not understand that counsel argue that the question of the validity of a pardon, in the abstract, is a local question. We will consider that subject, having shown that no court, State or Federal, ever decided between Taylor and Beckham, who was Governor of Kentucky, all holding that they had no jurisdiction.

STATE DECISIONS, INVOLVING GENERAL PRINCIPLES, NOT FOLLOWED IN FEDERAL COURTS.

If appellee was pardoned, no court had jurisdiction to arrest or try him. There are, perhaps, no questions that more involve general principles of law than those of pardon and jurisdiction questions and principles common to all courts, local and peculiar to none. The opinion of Chief Justice Marshall in U. S. vs. Wilson, *supra,* is taken as conclusive of these questions. The opinions of this court thereon are all one way, in fact. It cannot then be successfully contended by appellant that because the highest State court has passed upon and denied a pardon, it is therefore a local question, peculiar to that State, and that the Supreme Court must follow that decision. The established principles of the common law control

in determining the validity of a pardon. Let us concede that, in questions that are local and peculiar to a State, the Supreme Court follows the decisions of that State. The question of pardon, however, is no more local than the obligation of contracts, which State legislation can not impair; than the nature of taxation, commercial law, jurisdiction, etc. In these and similar questions, involving general principles, the Supreme Court has universally held that no State decision was binding, or to be considered, in determining its action.

> "It is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution and statutes of a State, which the Federal courts adopt as rules for their own judgments."

Olcott vs. Supervisors, etc., 83 U. S., 678.

In last-cited case, referring to the construction of a railroad and the right of eminent domain, Justice Strong said:

> "Whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State, as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles, common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted Legislative power, are matters, like questions of commercial law, no State court can conclusively determine for us."

Olcott vs. Supervisors, etc., *supra.*

That language can be applied, with equal force, to

the general principles that control in determining the validity of a pardon.

> "As to general principles, Federal courts follow their own views. *What shall constitute jurisdiction in a court is a general principle of law.*" Mohr vs. Manierre, 7 Biss. 419 (Italics ours).

The cases cited by counsel, (In re Converse, 137 U. S., 631, and Lambert vs. Barett, 157 U. S., 697), can have no bearing upon this case, because they relate purely to the construction by a State court of State laws. In the one case, the charge was embezzlement, under a State statute; in the other, the question was whether the Governor "could issue a warrant of execution of one convicted of murder after he had granted him a longer reprieve than authorized by the State constitution," the court holding that no Federal question was involved.

STATE DECISIONS NOT FOLLOWED, IF THEY DENY EQUAL CIVIL RIGHTS.

Federal courts do not follow State decisions upon the construction or enforcement of State laws, if they violate the Federal constitution, or the rights it guarantees.

Rowan vs. Runnels, 46 U. S., 134;

Bank of Ohio vs. Knoop, 57 U. S., 369;

Jefferson Branch Bank vs. Skelly, 66, U. S., 436.

The decisions rejecting Powers' pardon can not be here followed, not only because general principles of law, common to all courts, are involved, but because they deny to Powers the equal protection of the law in such a discrimination.

"Decisions of State courts, not resting upon construction of statutes of the State, but asserting general principles, independent of statute, are not obligatory upon United State courts in similar cases arising within the State." Town of Venice vs. Murdock, 92 U. S. 494.

Under this authority, based upon general principles heretofore mentioned, the decisions of the Kentucky court denying the pardon, and asserting, inferentially, who was Governor, are not to be considered in determining its validity.

It is only those decisions of a State court which settle some principle of local law that this court has ever felt bound to follow. If the constitution of Kentucky had granted Executive power to pardon a general class of offenses, and the State court had decided that the pardon to Powers was not, embraced in said grant, or class, either, we conceive, would have been a local question—the construction of a State constitution. No such question is presented. The validity of the pardon must be determined by general principles of law as though issued by the President of the United States.

We have shown that the State court did not decide the title to the Governorship as between Taylor and Beckham; but, assuming that it did, we hold that the recognition of Taylor, as Governor, by the political department of the United States Government, is conclusive. The record admission is that said recognition continued until Governor Taylor's abdication of office, on May 21, 1900, when the majority opinion of this court was rendered.

FEDERAL RECOGNITION OF THE TAYLOR ADMINISTRATION AS THE STATE GOVERNMENT OF KENTUCKY, BINDS ALL COURTS.

In addition to said record admissions, it is shown by affidavits in the record that, on the 1st day of February, 1900, Governor Taylor applied to the President of the United Sattes for recognition as the proper and legal Governor of Kentucky, and for protection against domestic violence, and that he was so recognized as the Governor of Kentucky in a reply telegram addressed by President McKinley, in his own handwriting, to "Governor W. S. Taylor." (See affidavits of Chas. Emory Smith, John W. Griggs, George B. Cortelyou and Wm. S. Taylor, pp. 225, 230-3, 236-7, 241, record, and exhibits therewith filed).

After the alleged determination by the Legislature of the contest for the Governorship, and of the contests for the minor offices of said State, there was established in Frankfort dual State governments, each claiming to be the State government of Kentucky----the one, headed by Governor Taylor, occupying the Executive offices and public buildings of the State, and the other by J. C. W. Beckham, claiming to be Governor, in headquarters established at a hotel in said city. It again became necessary for the Executive department of the United States to decide which should be recognized as the State government of Kentucky. An immense amount of mail had accumulated in the postoffice at Frankfort, addressed to the "Governor of Kentucky" and to other State officers, as such, and the postmaster at Frankfort had requested the Postmaster General of the United States to instruct him

as to whom such mail should be delivered. Thereupon the Postmaster General, Chas. Emory Smith, sought the advice of Attorney General John W. Griggs, and the two took the matter to President McKinley; and, after due consideration by the three, it was determined by all of them that the United States would recognize the actual incumbents of said offices, the alleged determination of said contests notwithstanding, and that mail, addressed as aforesaid, should be delivered to said incumbents, and the Postmaster General was requested to, and did, so instruct the postmaster at Frankfort, and the mail was, by said postmaster, delivered accordingly. The delivery of all subsequent mail, so addressed, to Wm. S. Taylor, as the Governor, and to the other incumbents of said offices, was continued until the abdication of office by Taylor, when the case of Taylor vs. Beckham was decided by this court, on May 21, 1900. (178 U. S., 548). (See affidavit of Ass't. Postmaster J. W. Pruett, record, p. 235).

In other words, it is clearly shown that, at the date of the pardon, Wm. S. Taylor was, by the legally constituted authorities of the United States, duly recognized as the Governor of Kentucky.

Affidavits can be used on questions of fact raised on jurisdictional issues:

Jenkins vs. York Cliffs Imp. Co., 110 F. R. 807;

Wetmore vs. Rymer, 169 U. S. 115,.

The action of the Postmaster General, giving the aforesaid instruction to the postmaster at Frankfort, must be regarded as the act of the President himself.

Jones vs. United States, 137 U. S. 202;

Wolsey vs. Chapman, 101 U. S., 755;

Runkle vs. U. S., 122 U. S. 557;

Willcox vs. Jackson, 38 U. S., 498;

United States vs. Eliason, 41 U. S., 291;

Confiscation Cases, 87 U. S., 92;

U. S. vs. Tarden, 99 U. S., 10;

Marberry vs. Madison, 5 U. S., 1st Cranch, 137;

Opinions Attorney General, Vol. 11, page 397.

In Jones vs. United States, the Supreme Court, in discussing the manner in which the Executive power of the President may be made known, said:

"There can be no doubt that it may be declared through the Department of State, whose acts in this regard are, in legal contemplation, the acts of the President."

In Wolsey vs. Chapman:

"The acts of the heads of departments, within the scope of their powers, are, in law, the acts of the President."

In Runkle vs. United States:

"There can be no doubt that the President, in the exercise of his Executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his Executive duties, and their official acts promulgated in the regular course of business are presumptively his acts."

In Willcox vs. Jackson:

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

In Confiscation Cases:

"A direction, given by the Attorney-General to seize property liable to confiscation under the Act of Congress, must be regarded as a direction given by the President. In Willcox vs. Jackson, 13 Peters, 498, it was ruled that the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

In the United States vs. Tarden:

"Under the Tenure of Office Act, the President had the power at that time, which was during the recess of the Senate, to suspend the Collector until the next session of the Senate, and the act of the Secretary, as the head of the Treasury Department, is presumed to be the act of the President."

In Marberry vs. Madison, 5 U. S., 1st Cranch, 137:

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders.

"In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists and can exist, *no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the Executive, the decision of the Executive in conclusive.*" (Italics ours).

In the letter of the Attorney-General James Speed to Honorable Wm. H. Seward, Secretary of State, dated November 13th, 1865, the Attorney-General said:

"Each of the Executive departments is, except where some special duty is directly imposed by Congress, under the immediate control and supervision of the President. What the department does must be regarded as having been done by the order and sanction of the President. As a general rule, no one can question the authority of the head of a department but the President."

The authority of the Executive officers of the United States to decide which of two contending factions in a State is the legally constituted government in such State, or which of two or more claimants to the Governorship therein shall be recognized as such Governor, is vested in such Executive officers by Section 4, Article 4, of the Constitution of the United States, which provides:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the Executive (when the legislative can not be convened) against domestic violence;"

and by Articles 1, 2, and 3 of the Constitution of the United States, which create and fix the respective limits of the Legislative, the Executive, and the Judicial departments of the Government of the United States. As stated by Judge Treat, in his opinion in United States vs. 129 Packages, Fed. Cas., 15941, Vol. 27, page 288:

"Whatever power is vested by the Constitution in one department of the Government can not be usurped by another. If one should wholly refuse to act, or should undertake to divest itself of, or abdicate, its legitimate functions, it would by no means follow that another department, expressly limited to specified duties, would thereby acquire ungranted powers. The

abdication of Executive functions by the Executive, for instance, would not constitute the Judicial the Executive department of the country; nor would a failure or refusal of the Legislative to pass needed statutes constitute the Executive the law-making. Each ute constitute the Executive the law-making power. Each department has its true boundaries prescribed by the Constitution, and it can not travel beyond them. (U. S. vs. Ferrera, 13 How.) (54 U. S.) 40; Little vs. Bareme, 2 Cranch, (6 U. S.) 170."

The Executive department of the United States having, in the exercise of its power under the Constitution and laws of the United States, decided to recognize W. S. Taylor as Governor of Kentucky, and having so recognized him, that decision is binding upon all the courts, *and the question as to whether it was right or wrong can not be raised by any of said courts.*

Black's Constitutional Law, pages 83 and 241-4;
Luther vs. Borden, 48 U. S., 7 Howard, 1;
U. S. vs. Palmer, 16 U. S., 610;
Williams vs. Suffolk Ins. Co., 38 U. S., 415;
U. S. vs. Yorba, 68 U. S., 412;
Georgia vs. Stanton, 73 U. S., 50;
Jones vs. U. S., 137 U. S., 202;
Hamilton vs. McClaughry, 136 Fed. Rep., 445;
Sutton vs. Tiller, 98 Am. Dec., 471;
The Hornet, Fed. Cas., No. 6705.

But before making special comment on any of these cases, we would respectfully call attention to the purpose and scope of said Sec. 4, Art. 4, of the Constitution, and the extent of the power conferred thereby on Congress and the President in matters pertaining to State government and the title to persons claiming to be officers thereunder.

By that Section, the United States is vested with the power, and burdended with the corresponding duty, of seeing that in each State there shall be a certain kind of government, denominated as a republican form of government.

A government republican in form is defined as one

> "which is based on the political equality of men. It is a government of the people, for the people, and by the people." Black's Constitutional Law, page 239.

As said by the Supreme Court in Minor vs. Happersett, 88 U. S., 162:

> "All the States had governments when the Constitution was adopted. In all, the people participated, to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term, as implied in the Constitution."

And in Duncan vs. McCall, 139 U. S., 449:

> "By the Constitution a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have them-

selves thereby set bounds to their own power as against the sudden impulses of mere majorities."

As to the effect of this guaranty on the States themselves, the court also said, in Minor vs. Happerett, page 631:

> "The guaranty necessarily implies a duty on the part of the States themselves to provide such a government."

As to the power and duty conferred on the United States by the guaranty, Mr. Black says, on page 241:

> "In effect, the guaranty does not only contain a promise to each State that it shall continue to enjoy a republican form of government as long as the Union endures, but also imports a command to each State to maintain and preserve that form of government, under penalty of the intervention of the Federal Union, for the benefit of all its members."

This being the meaning of a government, republican in form, and the duty of the States and the United States to see that such a government exists in each State, what power can the Executive or political department of the United States exercise in the discharge of that duty? And, what power can that department exercise in the discharge of every necessary duty that may arise in the daily transactions of the United States Government with the officers of a State in case of an unsettled controversy relating to the government therein, or to the title of one of its officers?

An answer to this question is found in so much of Section 1 of said Article 2 of the Constitution of the United States as reads:

> "The Executive power shall be vested in the President of the United States of America;"

and in so much of Sec. 3 of that Article as reads:

> "He (the President) shall take care that the laws be faithfully executed."

This power is, of course, limited by sub-Sec. 18 of Sec. 8, Article 1, which vests the legislative department of the Government with the power

> "to make all laws which shall be necessary and proper for carrying into execution * * * all * * * powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

But, as to matters in relation to which the legislative department has in no way undertaken to legislate, the power of the executive department, when necessary to be exercised, must be exercised by the President, or heads of the departments, as he or they may determine.

In the case of Luther vs. Borden, 48 U. S., 7 How. 1, the court, in discussing the power vested in the executive department in matters pertaining to State governments said:

> "Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of the State, has treated the subject as political in its nature and placed the power in the hands of that (political) department."

Going back to the table of cases cited above on the binding effect of a decision of the executive department,

the effect of such a decision is particularly illustrated by the exercise and effect of such executive power relative to foreign governments.

In the case of the United States vs. Palmer, it is held that when one part of a foreign nation separates itself from the old established government, and erects itself into a new and distinct government, the courts of the United States must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. In that case, the following question was certified to the Supreme Court:

> "Whether any colony, district or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed in any court of the United States an independent or sovereign nation or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act of statute or resolution of the Congress of the United States, or by some public proclamation or other public act of the executive authority of the United States, directly containing or announcing such acknowledgment, or by publicly receiving or acknowledging an ambassador or other public minister from such colony, district, or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made; and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States as to foreign States and sovereignties, their colonies and dependencies."

In response the Supreme Court, by Chief Justice Marshall, said:

> "This court is of opinion that when a civil war rages in a foreign nation---one part of which separates itself from the old established government and erects itself into a distinct government---the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States."

In Williams vs. Suffolk Insurance Co., the question was whether the Falkland Islands constituted any part of the dominions within the sovereignty of Buenos Ayres. The judges of the Circuit Court of the United States being divided in opinion, certified to the Supreme Court the following question for decision:

> "Whether, inasmuch as the American government has insisted, and does still insist, through its regular executive authority, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayeran government to regulate, prohibit, or punish, it is competent for the circuit court in this cause to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of said Falkland Islands; and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject, or whether the action of the American government on this subject is binding and conclusive on this court, as to whom the sovereignty of those islands belongs."

In answer the Supreme Court said:

"Prior to the revolution in South America, it is known that the Malvinas, or Falkland Islands, were attached to the viceroyalty of La Plata, which included Buenos Ayres. And if this were an open question, we might inquire whether the jurisdiction over these islands did not belong to some other part, over which this ancient viceroyalty extended, and not to the government of Buenos Ayres; but we are saved from this inquiry by the atttitude of our own government, as stated in the point certified.

"And can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it in the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise and so destructive of national character.

"In the cases of Foster vs. Neilson, (2 Peters, 253, 307), and Garcia vs. Lee, (12 Peters, 511), this court have laid down the rule that the action of the political branches of the government, in a matter that belongs to them, is conclusive.

"And we think, in the present case, as the executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and

acted on by this court as thus asserted and maintained."

It will be noticed that, in this last case, the turning point was that *the Executive of the United States, in his message and correspondence with the government of Buenos Ayres, had simply denied the jurisdiction* which that government had assumed to exercise over the Falkland Islands. As to that denial, the court says, *it is not material, nor is it the province of the court to inquire, whether that denial of authority by the Executive was right or wrong.*

In the case of Hamilton vs. McClaughry, it became necessary for the court to decide whether there had been a formal declaration of war between this country and either the government of China, or the "Boxer" element of that government. The court said:

> "It is well settled that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination, and are bound thereby."

In the case of The Hornet, the court refers to the said decision in United States vs. Palmer, and also the decision of the Supreme Court by the same learned judge in the case of The Divina Pastora, and says:

> "Whether a revolted colony is to be treated as a sovereign State, even *de facto,* is a political question and to be decided by the government, and not the court, has been decided in effect in several other cases than those before mentioned, as in Kennett vs. Chambers * * * and Clark vs. United States."

In Black's Constitutional Law, page 83, the author says:

> "The question which of two opposing governments, each claiming to be the rightful government of a State, is the legitimate government, is an illustration of the kind of question which the courts will refuse to decide, on the ground of their belonging to the political departments. So also is the question whether a state of war exists, or whether peace has been restored. And to this class belong questions relating to the government of a foreign country, as, what is its rightful government, whether the party in power constitutes a *de facto* government, what form of government obtains, and the like. The same is true of the question of admission of a State into the Union, and of the question of the extent of the jurisdiction of a foreign power."

This principle has been applied by the Acts of Congress to the sovereign states of the Union and Executive recognition of State government has been uniformly given by the courts the same effect as recognition of foreign governments.

The case of Luther vs. Borden grew out of a controversy in Rhode Island as to which of two governments was the rightful one----the Charter government, or the Constitutional government, headed by Thomas W. Dorr as Governor. During the existence of that controversy, the Charter Governor applied to the President for, and was granted, recognition; and the President

> "Took measures to call out the militia to support his authority if it should be found necessary for the Federal government to interfere, and, * * * it was the knowledge of this decision that put an end to the armed opposition to the Charter government."

Subsequently, Luther instituted an action of trespass against Borden and others for breaking into his house. The defendants justified upon the ground that during the existence of the aforesaid controversy, there was an insurrection in the State; that plaintiff was engaged in that insurrection; that the defendants, being in the military service of the State, entered plaintiff's house and searched, by command of their superior officer, for plaintiff to arrest him.

A recovery in the suit was sought upon the theory that the Constitutional government was the legal government, notwithstanding the action of the President. The Circuit Court held that the Charter government and laws, under which the defendants acted, were in full force and effect and the paramount laws of the State, and constituted a justification of the acts of the defendants. The correctness of that decision was the question involved on the writ of error in the Supreme Court, which held, among other things, that:

> "The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders, and it should be equally authoritive, for certainly no court of the United States with a knowledge of this decision would have been justified in recognizing the opposing party as the lawful government; or in treating as wrong doers or insurgents the officers of the government which the President had recognized and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice, and this principle has been applied by the Acts of Congress to the sovereign States of the Union."

The decision in last-cited case was referred to in Taylor vs. Beckham, 178 U. S. 548, in the following language:

> "In that case, it was held that the question, which of the two opposing governments of Rhodes Island, namely, the Charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it."

This reference was to a case seeking to go behind, and in a collateral way question the correctness of, the decision of the Supreme Court of the State and the decision of the President of the United States, as to which was the lawful government in Rhode Island. The court held that neither could be questioned in that way.

Similar reference was also made by the Supreme Court to that decision in Duncan vs. McCall, 139 U. S., 449.

In the case of The Hornet, District Judge Brooks also refers to it and says:

> "In the great case of Luther vs. Borden, than in the argument of which the great American constitutional lawyer rarely, if ever, displayed more learning, the Supreme Court unmistakably declared against the view urged by Mr. Webster, that the Federal courts have no jurisdiction of the question, whether a government organized in a State is the duly constituted government in the State. That is a question which belongs to the political, not to the judicial power. In that case, any disposition of that question could not have disturbed our relation with any established foreign power. No power, with whom the United States was at peace, or to whom

> our government was solemnly pledged to a just and clearly prescribed course, as by our neutrality acts, could or would have complained of a contrary decision in that case, and still that was held not to be a question with the court."

A careful study of the opinion in the Luther-Borden case, and all opinions referring to it, will show the prominent and ruling feature of each to be that part which holds that the action of the President in recognizing the head of the Charter government as the Governor of the State was binding on all the courts and its correctness could not be even questioned by any of them.

In the case of United States vs. Yorba, 68 U. S., 412, 17 L. Ed. 635, the Supreme Court held itself to be bound by the action of the political department of the government, in designating July 7, 1846, as the day when the conquest of California was completed and the Mexican officials were displaced.

The case of Georgia vs. Stanton was an effort, by suit filed in the Supreme Court of the United States, to restrain the defendants, the Secretary of War, the General of the Army, and Major-General Pope, from acting under orders of the President, from issuing any orders, or permitting any act within or concerning the State of Georgia, under certain Acts of Congress. A motion was made by counsel for the defendants to dismiss the bill for want of jurisdiction. That motion was sustained. The court said, among other things:

> "It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved and presented for adjudication are political and not

judicial and, therefore, not the subject of judicial cognizance.

"This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitations of the powers of each by the Constitution.

"The distinction between judicial and political power is so generally acknowledged in the jurisprudence, both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. N. Y. vs. Conn., 4 Dall. 4; Nabob of Carnatic vs. E. I. Co., 1 Ves. Jr., 375; S. C. 2 Ves. Jr. 56; Penn vs. Lord Baltimore, 1 Ves. Tr. 446, 447; Cherokee Nation vs. Georgia, 5 Pet., 1."

Sutton vs. Tiller was decided by the Supreme Court of Tennessee. Sutton was a captain in the United States army, in command of a post at Jacksboro, Tenn. Tiller was brought before him.

> "Some words arose when the plaintiff in error (Sutton) took the pistol in controversy from the defendant in error (Tiller), alleging that it was government property."

The action was to recover the value of the pistol. The case originated before a justice of the peace, but was tried before a circuit court of the State. At that trial,

> "the circuit judge instructed the jury, in substance, that the question whether or not such a flagrant state of war existed at the time and place as would authorize the plaintiff in error, in the exercise of his duties as commander, to take the pistol for the use of the government, was a question for their determination."

Of this instruction the Supreme Court of Tennessee said:

"This is erroneous. The question whether or not war in its legal sense existed is to be determined alone by the political power of the government, and of this determination the courts must take judicial knowledge. It is not a question that can in any event be left to a jury. The President of the United States by proclamation of April, 1861, and the Congress by Act of July, 1861, had recognized the existence of war, and had declared Tennessee to be one of the States in insurrection and rebellion. The court should have instructed the jury that war existed and that the military authorities of the United States were properly holding the post at Jacksboro, it being part of the insurgent territory, and that if the plaintiff in error as an officer of the United States service was in command of that post, then he had the right to exercise all the discretionary powers of a commander coming within the scope of his military duty."

See also Fed. Cas., Nos. 14501, 14254 and 15941.

These authorities are all one way, and they leave no ground for dispute. In addition to establishing the principle that the decisions of the executive department are not subject to review or question by the judicial tribunals, they establish the still further principle that when, for any reason, a decision of the executive department is made, the *fact* fixed by that decision binds and must govern the judicial tribunals in all cases involving the same fact, even though there be not the remotest connection between the cases in such tribunals and the one decided by the political department. This is clearly shown in Williams vs. Insurance Co., *ante*. That case was an action in the U. S. Circuit Court of Massachusetts to recover from the insurance company losses on the schooners, Harriet and Breakwater, which had been insured by said company. Both of these vessels, bound on a sealing voy-

age, proceeded to the Falkland Islands, where they were seized by one Lewis Vernet, acting as Governor of those islands under the appointment of the government of Buenos Ayres. They were seized on the claim that the islands composed part of the dominions of the government of Buenos Ayres, and that, therefore, the parties in charge of them were without authority to fish there for seals. On the trial there was evidence that the United States, through its regular executive authority, had contended and was still contending that the claim of the Buenos Ayres government was not well founded. The point was made before the trial court that this mere contention by the executive authority precluded the court from going into the question as to whom the islands did belong. On that point the judges of the circuit court were divided in opinion. Thereupon they certified to the Supreme Court the question hereinbefore copied, the substance of which was, inasmuch as the American government contended as above stated through its executive authority, was it competent for the circuit court to inquire into and ascertain by other evidence the title of Buenos Ayres to the sovereignty of said islands? To the question the Supreme Court made answer in the negative, as cited.

To the same effect is Jones vs. United States, *ante*. Henry Jones was indicted in the U. S. District Court for the District of Maryland for murder, committed at Navassa Island. The indictment was based upon the alleged fact that said island was under the exclusive jurisdiction and within the possession of the United Sates, and out of the jurisdiction of any particular State or District

thereof. The indictment also charged that the District of Maryland was the district into which the defendant was first brought from said island.

> "At the trial, the United States, to prove Navassa Island was recognized and considered by the United States as appertaining to the United States under the provisions of the laws of the United States in force with regard to such islands, offered in evidence certified copies of papers from the records of the State Department of the United States."

These papers showed that for certain reasons the executive authority claimed that said islands belonged to the United States. On the trial, the court held that the claim of the executive authority precluded it from inquiring further into the ownership of said island. The defendant was convicted and sentenced to death, and he sued out a writ of error from the Supreme Court, which held that the trial court was correct in holding itself bound by said action of the executive authority.

In the first of these cases, the liability of the insurance company was fixed on the action of the executive department of the United States in a matter that had no reference to an insurance policy. In the second, a death penalty was affirmed on the claim of the executive department that Navassa Island belonged to the United States----a claim having no reference whatever to the crime of murder.

So, in the case at bar. The President decided to, and did, recognize W. S. Taylor as the Governor of Kentucky; that recognition existed at the time the pardon was issued. That said recognition conclusively binds every court of the United States in every case involving the

question as to who was the Governor of Kentucky at that time, we earnestly contend. The correctness of our position can be illustrated by supposing that the postmaster at Frankfort should be indicted for delivering the mail to the wrong person. He would make a complete defense by calling attention to the fact that at the time he so delivered the mail, the person to whom he delivered it, W. S. Taylor, was recognized by the President of the United States as the Governor of Kentucky. The case at bar involves the same question as in the supposed indictment. Is it not true that the same fact that would bind the court in the supposed case, binds it in this case? And does it not necessarily follow that this Honorable Court is now bound to hold that W. S. Taylor was, at the time he granted said pardon, the legal and actual Governor of the State of Kentucky, and that a denial of that fact by the State is a denial to appellee of the equal protection of the laws?

In Jones vs. United States, 137 U. S. 202, 34 L. Ed. 691, the court said:

> "Who is sovereign *de jure* or *de facto* of a territory is not a judicial, but a political question, the determination of which the legislative and Executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

CONCLUSIONS.

From the foregoing citations, this court has decided:

1. That, in extradition proceedings, the unlawfulness of an arrest may be inquired into, in a State or Federal court;

2. That Federal courts recognize and enforce State pardons;

3. That, in the absence of controlling enactment to the contrary, the common law of England determines the validity and effect of a pardon, in State and Federal courts; therefore,

4. That a State adjudication upon the validity of a pardon involves general principles of law, common to all courts, and is therefore not followed in Federal courts;

5. That if a State decision upon a purely local question denies equal civil rights, it will not be followed in Federal courts;

6. Federal recognition of a State government is conclusive, and controls all courts, State and Federal.

We conclude, and respectfully ask, that the appeal herein be dismissed, and the writ of *mandamus* denied.

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